

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001004-MR

EXTENDICARE, INC.;
EXTENDICARE HOMES, INC.,
D/B/A MEDCO CENTER OF
BRANDENBURG; EXTENDICARE
HEALTH NETWORK, INC.;
EXTENDICARE REIT; EXTENDICARE,
L.P.; EXTENDICARE HOLDINGS, INC.;
EXTENDICARE HEALTH SERVICES,
INC.; AND EXTENDICARE HEALTH
FACILITY HOLDINGS, INC.

APPELLANTS

v. APPEAL FROM MEADE CIRCUIT COURT
HONORABLE BRUCE T. BUTLER, JUDGE
ACTION NO. 12-CI-00356

BONNIE SANDAGE, AS NEXT
FRIEND OF REVIL ROETTGER,
AN INCAPACITATED PERSON

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DIXON, NICKELL, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Extendicare, Inc., Extendicare Homes, Inc., D/B/A Medco Center of Brandenburg, Extendicare Health Network, Inc., Extendicare Reit, Extendicare, L.P., Extendicare Holdings, Inc., Extendicare Health Services, Inc.; and Extendicare Health Facility Holdings, Inc., (hereinafter collectively referred to as Extendicare) brings this appeal from an order of the Meade Circuit Court dated May 7, 2013, denying Extendicare's motion to compel arbitration and to dismiss or stay pending lawsuit. For the reasons stated, we affirm.

To begin, we note that the order on appeal in this case is interlocutory and normally not subject to appellate review, absent the necessary recitations required by Kentucky Rules of Civil Procedure (CR) 54.02. However, the order on appeal in this case expressly denies a motion by Extendicare to compel arbitration and as such the order is subject to immediate appeal pursuant to Kentucky Revised Statutes (KRS) 417.220(1). Our review thus proceeds accordingly.

Extendicare operates a nursing home in Brandenburg, Kentucky, known as Medco Center of Brandenburg. Revil Roettger was admitted to the Medco Center on June 24, 2001. At the time of admission, Bonnie Sandage, her daughter, was acting under a power of attorney on behalf of Roettger. In signing various admission agreements on behalf of Roettger, Sandage signed a document styled Alternative Dispute Resolution Agreement – Kentucky, which effectively provided that all disputes or controversies arising during Roettger's residence at Medco Center would be resolved by binding arbitration. The agreement conspicuously

states at the top thereof that execution of the agreement was not a condition for admission to or for continued residence at Medco Center.

Roettger resided at Medco Center until April 16, 2012. On September 28, 2012, Sandage initiated this action on behalf of Roettger in the Meade Circuit Court asserting damages for alleged personal injuries sustained by Roettger during her stay as a resident at Medco Center and further asserting various claims under KRS 216.515, regarding alleged violations of duties of care owed to Roettger as a resident of Medco Center. On November 2, 2012, Extendicare filed a motion to compel arbitration and stay or dismiss the pending lawsuit. Extendicare's motion was in reliance upon the arbitration agreement executed by Sandage as attorney-in-fact for Roettger at the time of Roettger's admission in June 2011. The circuit court denied Extendicare's motion by order entered May 7, 2013. Extendicare timely filed this interlocutory appeal.

ANALYSIS

We begin our analysis in addressing the appropriate standard of review by this Court. The arbitration agreement provides that it is governed by both the Kentucky Uniform Arbitration Act as set out in KRS 417.045 *et seq.* and the Federal Arbitration Act (FAA) as set out in 9 U.S.C. § 1 *et seq.* The Kentucky Uniform Arbitration Act (KUAA) and 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 590.

In *Ping*, 376 S.W.3d 581, 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, similar to that granted by Roettger to Sandage in this case. 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.

The circuit court, in denying Extendicare’s motion to compel arbitration, relied upon the *Ping* decision and specifically concluded that the power of attorney granted to Sandage by Roettger did not encompass the power to execute an arbitration agreement on Roettger’s behalf in her admission to the nursing home. *See Ping*, 376 S.W.3d 581. Extendicare argues that the power of attorney executed by Sandage is clearly distinguishable from the power of attorney in the *Ping* case and that certain terms and provisions therein clearly contemplate granting Sandage the authority to enter into an arbitration agreement on behalf of Roettger. *See Ping*, 376 S.W.3d 581

In *Ping*, 376 S.W.3d 581, the Kentucky Supreme Court went into an exhaustive legal analysis as concerns circumstances where the granting of a general or durable power of attorney would be sufficient for a principal to grant an agent the authority to enter into an arbitration agreement. The Supreme Court placed great emphasis on whether the authority granted to the agent under the power of attorney was necessary and incidental to achieving the principal’s objectives as would be reasonably understood by the agent regarding the

principal's intentions. *Id.* at 592. In other words, the power of attorney that was utilized in the *Ping* case looked primarily to the making of healthcare decisions and those actions reasonably necessary to maintain property and finances of the principal. *Id.* In *Ping*, it was unreasonable for the Court to assume that the agent could sign an arbitration agreement for the principal absent some express authority. *Id.* at 593.

Extencicare argues that certain language in the power of attorney granted to Sandage is distinguishable from the power of attorney at issue in *Ping*, 376 S.W.3d 581, and thus creates the authority for Sandage to enter into the arbitration agreement for Roettger. Specifically, Extencicare cites to language in the Roettger power of attorney granting Sandage the power to collect sums of monies and to initiate legal actions on behalf of Roettger. In analyzing and comparing the power of attorney granted to Sandage as concerns the analysis taken by the Kentucky Supreme Court in *Ping*, 376 S.W.3d 581, we are guided by the Supreme Court's express admonition that "absent authorization in the power of attorney to settle claims and disputes or some such express authorization addressing dispute resolution, authority to make such a waiver is not to be inferred lightly." *Id.* at 593.

Extencicare argues that the language cited in Roettger's power of attorney inherently allows Sandage to settle claims and disputes, and thus Sandage had authority to execute the arbitration agreement and effectively waive Roettger's right to litigate this dispute. However, based on our review of the power of

attorney in this case, the language contained therein is remarkably similar to *Ping*, 376 S.W.3d 581. And, there is certainly no express authorization permitting Sandage to settle any claim or dispute nor enter an arbitration agreement on behalf of Roettger. The specific language relied upon by Extendicare to distinguish *Ping* reads as follows:

That I, Revil L. Roettger . . . constitute, and appoint Bonnie L. Sandage, . . . my true and lawful attorney, for me and in my name, place, and stead, to ask, and demand, sue for, collect and receive all sums of money, dividends, payments, on account of debts, and legacies and all property now due or which may hereafter become due and owing to me, and give good and valid receipts and discharges for such payments, . . . to retain counsel and attorneys on my behalf, to appear for me in all actions and proceedings to which I may be a party in the courts of Kentucky or any other state in the United States, or in the United States' courts; to commence actions and proceedings in my name, if necessary, to sign and verify in my name all complaints, petitions, answers and other pleadings of every description[.] . . .

Roettger Power of Attorney at 1.

The language set forth above clearly reflects the intention of Roettger to permit Sandage to maintain Roettger's property and finances and to make decisions incident thereto. The power of attorney further permits Sandage to initiate litigation on her behalf to collect debts, but does not authorize the settling of claims and disputes on Roettger's behalf as argued by Extendicare. Such an interpretation would take the express language totally out of context. And, granting Sandage the right to initiate legal action on Roettger's behalf is totally in contradiction to any claim that Roettger intended to waive her right to initiate

litigation in favor of arbitration or some other form of alternative dispute resolution. As noted, the power of attorney contains no express authorization by Roettger for Sandage to settle claims and disputes. While Extencicare certainly invites us to infer such a meaning from the language cited, we would have to effectively substitute our judgment as concerns the plain meaning of these words as determined by the circuit court, which would be contrary to the holding in *Ping*, 376 S.W.3d 581. The circuit court's finding that the power of attorney does not grant Sandage the authority to settle claims is not clearly erroneous, and thus, will not be disturbed on appeal.

Extencicare also suggests that the Meade Circuit Court's decision below effectively circumvents Federal law as well as the Kentucky Constitution. However, this Court is not at liberty to make such a determination given the mandate of the Kentucky Supreme Court in *Ping*, 376 S.W.3d 581, on this issue. Kentucky Supreme Court Rule 1.030(8)(a) specifically provides that this Court is bound by and shall follow applicable precedents established in the opinions of the Supreme Court and its predecessor Court. We, thus, have no authority to exceed the bounds established by the Kentucky Supreme Court as concerns the interpretation of a power of attorney and the authority to enter into an arbitration agreement thereunder. Based on our review, this case is not distinguishable from *Ping*, 376 S.W.3d 581, and we simply cannot conclude that the power of attorney executed by Roettger granted Sandage the authority to enter into an arbitration agreement to arbitrate any dispute arising from Roettger's residency at Medco

Center. The record in this appeal does not provide any evidence to indicate that Sandage had the express or implied authority to enter into an arbitration agreement on behalf of Roettger. Having failed in its burden to establish the existence of a valid arbitration agreement, we can find no error in the circuit court's denial of Extendicare's motion to compel arbitration in this case.

For the foregoing reasons, the order of the Meade Circuit Court denying Extendicare's motion to compel arbitration is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

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