RENDERED: NOVEMBER 9, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001799-MR

NEW OAKLAWN INVESTMENTS, LLC
D/B/A OAKLAWN HEALTH AND
REHABILITATION CENTER APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v. HONORABLE ANGELA MCCORMICK BISIG, JUDGE
ACTION NO. 14-CI-006467

KELLI STEIN, as Executrix of
the Estate of JUNE LEE APPELLEE

OPINION
REVERSING AND
REMANDING

** ** ** ** **

BEFORE: CLAYTON, COMBS AND D. LAMBERT, JUDGES.

COMBS, JUDGE: New Oaklawn Investments, LLC, d/b/a Oaklawn Health and Rehabilitation Center ("Oaklawn"), appeals from the denial of its motion to compel arbitration. Based in part upon the opinion of the Supreme Court of the United States in *Kindred Nursing Centers Ltd. Partnership v. Clark,* ___ U.S.

____, 137 S.Ct. 1421, 197 L.Ed.2d 806 (2017), we reverse and remand for an order dismissing the action.

June Lee was a resident at Oaklawn from May 8, 2012, until May 2, 2014. On January 4, 2006, before Lee became a resident of Oaklawn, she executed a "Durable Power of Attorney" in which she appointed her daughter, Kelli Stein, as her attorney-in-fact. Among other things, this power of attorney (POA) expressly granted Stein power to "enter into contracts of any kind or description whatsoever, and to exercise any right, option or election which I [Lee] may have or acquire under any contract." Additionally, Stein was authorized to "assert by litigation or otherwise" any claim on Lee's behalf. The POA provided that it was Lee's intention to grant to Stein "full and complete authority to act for me [Lee] and in my stead in all matters." It also provided that "[i]n no event shall persons relying on this Power of Attorney be required to ascertain the authority of my attorney-in-fact to act hereunder, and all persons dealing with said attorney-in-fact shall be entitled . . . to rely upon the authority of such person." Finally, the POA provided that "the acts of the attorney-in-fact shall bind me and acquit persons dealing with my attorney-in-fact to the same extent as if I [Lee] had been acting in my own behalf." The POA was duly notarized.

With this POA, Stein executed some paperwork for Lee upon her admission to Oaklawn on May 8, 2012. Two days later, on May 10, 2012, Stein

reviewed several additional documents necessary to complete Lee's admission paperwork. Among these documents was one entitled "Alternative Dispute Resolution Agreement" (the ADR agreement). The ADR agreement provided that the parties were waiving their rights to trial before a judge or jury and assenting to binding arbitration. By executing the ADR agreement, Stein agreed, on Lee's behalf, "to resolve any dispute that might arise between us [the facility and the resident] through this Agreement where the amount in controversy exceeds $25,000." By its terms, the ADR agreement was incorporated into the parties' "Admission Agreement," also signed by Stein on Lee's behalf.

On December 17, 2014, Stein, acting as Lee's attorney-in-fact, filed this personal injury action against Oaklawn in Jefferson Circuit Court. Stein alleged that Oaklawn had been negligent in its care and treatment of Lee.[1]

On January 15, 2015, Oaklawn filed a motion to dismiss the case, arguing that the arbitration agreement that Stein had executed prohibited the legal action. Relying on the decision of the Supreme Court of Kentucky in *Extendicare Homes, Inc. v. Whisman,* 478 S.W.3d 306 (Ky. 2015), the Jefferson Circuit Court denied the motion. The court denied Oaklawn's subsequent motion for reconsideration on the same basis. This appeal followed.

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[1] June Lee died on June 18, 2016. After Lee's death, Stein amended the complaint to reflect that the action was now being prosecuted in her capacity as executrix of Lee's estate.

On appeal, Oaklawn argues that the trial court's refusal to dismiss the action and to compel arbitration cannot be affirmed on the basis of the *Whisman* decision because the rationale underlying its holding was recently rejected by the Supreme Court of the United States in *Kindred Nursing Centers v. Clark, supra.* We agree.

In *Whisman,* the Supreme Court of Kentucky examined the power-of-attorney documents in each of three consolidated cases. The court stated that:

> without a clear and convincing manifestation of the principal's intention to do so, we will not infer the delegation to an agent of the authority to waive a fundamental personal right so constitutionally revered as the "ancient mode of trial by jury."

Id. at 313. The court concluded that an attorney-in-fact has authority to execute an arbitration agreement **only** where the power-of-attorney document explicitly grants that specific authority – the "clear-statement rule."

Upon its review, the Supreme Court of the United States emphasized that the Federal Arbitration Act (the FAA) pre-empts any state rule discriminating on its face against arbitration. 9 U.S.C. § 2. The Court rejected our "clear-statement rule" because it singled out arbitration agreements for disfavored treatment in derogation of the FAA. It concluded that in *Whisman, supra,* Kentucky's Supreme Court had "specially impeded the ability of attorneys-in-fact to enter into arbitration agreements" and "flouted the FAA's command to place

those agreements on an equal footing with all other contracts." ___ U.S. ____, at _____, 137 S.Ct. 1421, 1429, 197 L.Ed.2d 806 (2017).

The decision of the Jefferson Circuit Court denying Oaklawn's motion to compel arbitration was based upon its conclusion that the language of the POA, while comprehensive, did not **explicitly** grant Stein authority to agree to arbitration. The broad language of Lee's POA was a universal delegation of authority to her daughter. It impliedly encompassed the power to enter into an arbitration agreement on her mother's behalf. While the circuit court's decision comported with precedent binding upon it at the time it was rendered, the court's conclusion cannot be affirmed on that basis now as it directly runs afoul of the provisions of the FAA as articulated by the U.S. Supreme Court in *Clark, supra*.

Stein contends that the circuit court's decision can be affirmed upon other grounds, however. She argues that the parties' ADR agreement should be invalidated because "it goes against numerous clear principles of contract law." In the alternative, she argues that the agreement should be voided on the basis of public policy.

Under both the FAA and the Kentucky Uniform Arbitration Act, agreements to submit controversies to arbitration may be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; KRS 417.050.

First, Stein maintains that the ADR agreement cannot be enforced since Lee was never specifically listed as a party to the agreement and Stein never indicated to Oaklawn that she was signing as Lee's attorney-in-fact. We disagree.

Stein admitted in the proceedings below that she had executed the arbitration agreement on behalf of her mother. Furthermore, the arbitration agreement was incorporated by reference into the parties' Admission Agreement, which specifically identified the parties. Lastly, the POA expressly provides as follows:

> [i]n no event shall persons relying on this Power of Attorney be required to ascertain the authority of my attorney-in-fact to act hereunder, and all persons dealing with said attorney-in-fact shall be entitled . . . to rely upon the authority of such person.

Oaklawn was entitled to rely on the POA, and we are not persuaded that the arbitration agreement was unenforceable upon its signing by Stein.

Next, Stein contends that the arbitration agreement was not supported by consideration. However, the Supreme Court of Kentucky reiterated in *Energy Home, Division of Southern Energy Homes, Inc., v. Peay,* 406 S.W.3d 828 (Ky. 2013), that an arbitration clause requiring both parties to submit equally to arbitration constitutes adequate consideration. Thus, the arbitration agreement does not fail upon this basis.

Stein also contends that the terms of the parties' arbitration agreement render it unconscionable both substantively and procedurally. She contends that the ADR agreement is unconscionable because it is essentially a contract of adhesion. She argues that the provisions of the agreement are overly broad and unduly burdensome; that she believed that she had no choice but to sign the agreement to complete the admissions process; and that "she had no clarity or assistance from [Oaklawn] or its employees in interpreting the terms of the [ADR agreement]." We are compelled to disagree with these assertions.

The requirements of the ADR agreement are spelled out in language that is easily understood by an adult of ordinary intelligence. It contains no fine print. The provisions of the agreement explain that its execution is entirely optional and not a precondition to admission, medical treatment, or services offered by the facility. The agreement clearly provides in bold print that both parties are agreeing to waive their rights to trial before a judge or jury if a dispute should arise.

Stein was made aware that she had a right to consult with an attorney prior to executing the agreement, and she acknowledged that she had had the opportunity to consult with an Oaklawn representative regarding any explanations that she required. Stein was also advised that she had thirty (30) days to rescind

the agreement. There is nothing about the agreement to suggest that it was unreasonably or grossly unfavorable to one side or the other.

Finally, Stein contends that enforcement of the ADR agreement contravenes public policy. Again, we disagree.

Stein asserts that "Kentucky has a strong public policy against enforcement of pre-dispute agreements, which limit or eliminate the plaintiff's right to seek redress for injury in court." She contends that the arbitration process reveals a strong bias in favor of defendant healthcare providers and that where it is used to resolve medical malpractice claims, arbitration can undermine the deterrent effect of costly claims against tortfeasors. Stein asserts that the ADR agreement deprives her of access to the court "yet provides no viable alternative."

There is nothing in our jurisprudence to support the contention that enforcement of valid arbitration agreements is contrary to our public policy. Furthermore, because the Supreme Court of the United States has held that the FAA applies to proceedings in state courts, any attempt to impose some "suspect status" onto arbitration proceedings is strictly forbidden. *See Kindred Nursing Centers Ltd. Partnership*, *supra.* The ADR agreement between the parties may be enforced if the circuit court deems it to be a valid contract pursuant to classic principles of contract interpretation.

In light of *Clark, supra,* we would direct the Jefferson Circuit Court to re-examine the language of the contract and to determine its enforceability in harmony with that most recent pronouncement on this issue.

The order of the Jefferson Circuit Court is reversed, and we remand for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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