RENDERED: MAY 31, 2019; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001270-MR

GOLDEN GATE NATIONAL SENIOR CARE, LLC, D/B/A GOLDEN LIVING; GGNSC FRANKFORT, LLC D/B/A GOLDEN LIVINGCENTER - FRANKFORT; GGNSC ADMINISTRATIVE SERVICES, LLC D/B/A GOLDEN VENTURES; GGNSC HOLDINGS, LLC D/B/A GOLDEN HORIZONS; GGNSC EQUITY HOLDINGS, LLC; GGNSC EQUITY HOLDINGS II, LLC; GOLDEN GATE ANCILLARY, LLC D/B/A GOLDEN INNOVATIONS; GGNSC CLINICAL SERVICES, LLC D/B/A GOLDEN CLINICAL SERVICES; GPH FRANKFORT, LLC; CHRISTY KING, IN HER CAPACITY AS ADMINISTRATOR OF GOLDEN LIVINGCENTER – FRANKFORT; WAYNE KARCZEWSKI, IN HIS CAPACITY AS ADMINISTRATOR OF GOLDEN LIVINGCENTER, FRANKFORT; AND CHRISTOPHER THOMAS JACKSON, IN HIS CAPACITY AS ADMINISTRATOR OF GOLDEN LIVINGCENTER - FRANKFORT — APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 14-CI-01439

BARBARA RUCKER, AS EXECUTRIX OF THE ESTATE OF LORAINE BROWN — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; DIXON AND LAMBERT, JUDGES.

LAMBERT, JUDGE: This appeal is from an order of the Franklin Circuit Court holding that the Appellants' (collectively, Golden Living Center's) arbitration agreement is invalid and denying the motion to dismiss or stay the Appellee's claims. We affirm.

Loraine Brown was admitted to Golden Living Center in October 2008. At that time, her daughter, Barbara Rucker, as power of attorney (POA), executed a number of admissions documents. Included in the packet was a three-page arbitration agreement, signed by Rucker. Brown was eventually discharged from Golden Living and remained in her personal residence for several years.

In January 2014, Brown was again admitted to the facility. This time, when presented with the packet of admission documents, she chose not to sign the arbitration agreement. Important to note are two facts: The document, underneath its title ("Alternate Dispute Resolution Agreement") contained the sentence, "This agreement is **not** a condition of admission to or continued residence in the facility"; and, on the signature line, it specifically noted that "[t]he Alternative Dispute Resolution Agreement above set forth is hereby DECLINED," and this was signed by "Barbara B. Rucker POA." (Emphases original.) Golden Living

Center's agent also signed this agreement, acknowledging that Brown had declined it.

Brown remained at Golden Living, except for times when she was hospitalized, until April 29, 2014. She filed a lawsuit against the appellants on December 1, 2014, with claims against them for negligence, medical negligence, corporate negligence, and violations of the Long-Term Care Residents Rights Act, Kentucky Revised Statute (KRS) 216.510 *et. seq.* Brown alleged numerous injuries caused by the wrongful conduct of Golden Living Center during her brief 2014 stay there. These injuries, she claimed, resulted in "accelerated deterioration of her health and physical condition beyond that caused by the normal aging process."

Shortly thereafter, Golden Living Center filed a "Motion to Dismiss or, in the Alternative, to Stay the Lawsuit Pending Arbitration Proceedings." The parties briefed their respective stances on the motion. On March 12, 2015, the circuit court held a hearing, and the order denying Golden Living Center's motion was entered on August 14, 2015. A notice of appeal was timely filed. The matter was held in abeyance in this Court (pending relevant decisions in state and federal courts) and was returned to the active docket in late 2018. The parties were allowed supplemental briefing to address new case law applicable to these issues.

Meanwhile, Brown passed away on December 31, 2017. By agreement of the parties, Rucker (as executrix for the estate of her mother) was substituted as a party plaintiff by order entered May 4, 2018. *See* KRS 395.278.

We begin by stating our standard of review in appeals from orders denying motions to compel arbitration:

> Ordinarily, such orders are interlocutory and are not immediately appealable. However, an order denying a motion to compel arbitration is immediately appealable. KRS 417.220(1). *See also Conseco Finance Servicing Corp. v. Wilder*, 47 S.W.3d 335, 340 (Ky. App. 2001). The enforcement and effect of an arbitration agreement is governed by the Kentucky Uniform Arbitration Act (KUAA), KRS 417.045 *et seq.*, and the Federal Arbitration Act, (FAA) 9 U.S.C.4 §§ 1 *et seq.* "Both Acts evince a legislative policy favoring arbitration agreements, or at least shielding them from disfavor." *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581, 588 (Ky. 2012).
>
> But under both Acts, a party seeking to compel arbitration has the initial burden of establishing the existence of a valid agreement to arbitrate. *Id.* at 589. That question is controlled by state law rules of contract formation. *Id.* at 590. The FAA does not preempt state law contract principles, including matters concerning the authority of an agent to enter into a contract and which parties may be bound by that contract. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630-31, 129 S. Ct. 1896, 1902, 173 L. Ed. 2d 832 (2009). Since this matter is entirely an issue of law, our standard of review is *de novo*. *Conseco*, 47 S.W.3d at 340.

Genesis Healthcare, LLC v. Stevens, 544 S.W.3d 645, 648-49 (Ky. App. 2017).

Golden Gate Living argues that the Franklin Circuit Court committed error by holding invalid the 2008 Resident and Facility Arbitration Agreement. It first contends that both federal and state policies strongly favor enforcement of arbitration agreements and that Brown/Rucker failed to meet the heavy burden of proving that no agreement existed. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341, 131 S. Ct. 1740, 1747, 179 L. Ed. 2d 742 (2011).

We disagree. "*Ping* is not preempted by the FAA under *Concepcion*." *Preferred Care Partners Management Group, L.P. v. Alexander*, 530 S.W.3d 919, 923 (Ky. App. 2017). Golden Gate Living had the initial burden of proving the existence of a valid agreement, and it did meet its burden of proving the existence of the 2008 agreement. But the circuit court negated the validity of the 2008 because the durable power of attorney, executed by Brown in 2004, did not explicitly grant Rucker the authority to enter into the arbitration agreement. That document enabled Rucker to "institute, maintain, defend, settle and dismiss legal proceedings." But it did not expressly authorize her to enter into an arbitration agreement, which would have the effect of waiving Brown's right to a jury trial.

"Absent authorization in the [POA] 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." *Ping*, 376 S.W.3d at 593. In this case, the circuit court held, "Nothing in Ms. Brown's POA suggests that her intent was

to authorize her daughter, Ms. Rucker, to make such waivers on her behalf; therefore, no *actual* or *apparent* authority existed to sign the arbitration agreement." (Emphasis original.) Thus, the circuit court's holding regarding the authority of the POA is in harmony with *Ping*, and we decline to disturb that holding. *See also Genesis Healthcare*, 544 S.W.3d at 651-52.

The question then becomes whether the 2014 decision to decline the arbitration agreement superseded the 2008 agreement. The circuit court held that it did, and we agree. We accept Golden Gate Living's assertion that the 2008 agreement contained language that stated the agreement "shall remain in effect for all subsequent stays." Yet the number of intervening years and the execution of all new documents on admission in 2014, with Brown/Rucker expressly declining the arbitration agreement, essentially nullified the 2008 agreement.[1] The circuit court correctly determined that the act of declining the 2014 agreement constituted a novation. *Kirby v. Scroggins*, 246 S.W.2d 453, 455 (Ky. 1952).

We lastly consider the issue of impossibility to perform. We need not reach this issue on its merits. "Since there was no valid agreement, we need not

[1] *See also GGNSC Louisville St. Matthews LLC v. Badgett*, 728 Fed. App'x 436, 443 (6th Cir. 2018) ("the second agreement constitutes an implied novation because it is manifestly inconsistent with the first agreement and rendered it impossible of performance"); *GGNSC Louisville Hillcreek, LLC v. Estate of Bramer*, No. 3:17-CV-439-DJH, 2018 WL 4620968, *3 (W.D. Ky Sept. 26, 2018); *and Campagna v. GGNSC Louisville Hillcreek, LLC*, No. 3:16-CV-507-DJH-CHL, 2018 WL 3041081, *3 (W.D. Ky. June 19, 2018). Although these are unpublished federal court decisions, they involve the same parent company and issues as this case. Kentucky Rule of Civil Procedure 76.28(4)(c).

consider whether the designation of the [now defunct named arbitrator] makes the Agreement impossible to perform." *Genesis Healthcare*, 544 S.W.3d at 651-52.

The order of the Franklin Circuit Court is affirmed.

CLAYTON, CHIEF JUDGE, CONCURS.

DIXON, JUDGE, CONCURS IN RESULT ONLY.

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