RENDERED: MAY 17, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-001652-MR

LEXINGTON EAST MEDICAL INVESTORS, LLC, D/B/A MORNING POINTE OF LEXINGTON EAST; BRENDA DAFF, AS ADMINISTRATOR OF MORNING POINTE OF LEXINGTON EAST; LISA HARRISON, AS ADMINISTRATOR OF MORNING POINTE OF LEXINGTON EAST; ELIZABETH CHAPPELL, AS ADMINISTRATOR OF MORNING POINTE OF LEXINGTON EAST; INDEPENDENT HEALTHCARE PROPERTIES, LLC — APPELLANTS

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 17-CI-01263

BARBARA SCHUBERT, BY AND THROUGH HER CO-GUARDIANS, PHILIP GEOGHEGAN AND NORA KERBYSON — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TAYLOR, K. THOMPSON AND L. THOMPSON, JUDGES.

THOMPSON, L., JUDGE: This appeal concerns the trial court's denial of Appellants' motion to compel arbitration. Appellants argue that the arbitration agreement was valid and should have been enforced by the court. Appellee argues that the trial court correctly denied the motion to compel arbitration. We find the trial court did not err and affirm.

On January 14, 2014, Barbara Schubert moved into an apartment at Morning Pointe of Lexington East, an assisted living facility for senior citizens. Prior to her moving in, Philip Geoghegan, who had power of attorney over Ms. Schubert, executed several documents on her behalf. One such document was the arbitration agreement at issue in this case. The arbitration agreement required that all actions or disputes arising between Morning Pointe and Ms. Schubert would be resolved by binding arbitration. The arbitration was to be "conducted at a place agreed upon by the parties in accordance with the Code of Procedure of the National Arbitration Forum ("NAF") which is hereby incorporated into this agreement.

On April 17, 2017, Mr. Geoghegan, on behalf of Ms. Schubert, filed a complaint against Morning Pointe and the other Appellants claiming that Appellants were negligent in the care and treatment of Ms. Schubert. After answering the complaint, Appellants filed a motion to dismiss or stay the action pending alternative dispute resolution. This motion sought to compel Appellee to

arbitrate her claims. Appellee responded to the motion alleging multiple defenses; however, this case turns on the unavailability of the NAF to serve as arbitrator. In 2009, the NAF stopped arbitrating consumer arbitrations; therefore, it was unavailable to arbitrate the claims brought by Appellee. Appellee argued that enforcement of the arbitration agreement was impossible because the NAF could not act as arbitrator. Appellants then responded and argued that the agreement could still be enforced because the Federal Arbitration Act (FAA) provides a mechanism to appoint a substitute arbitrator.

On August 29, 2017, the parties appeared before the trial court to present oral arguments on the motion to dismiss. On September 8, 2017, the trial court entered an order denying Appellants' motion to compel arbitration. The trial court found that the NAF Code, which was incorporated into the arbitration agreement, provided that only the NAF would be allowed to administer the NAF Code of Procedure and that the Code allows the parties to seek "legal and other remedies" if the NAF is unable to arbitrate a dispute. The court found that the arbitration agreement was enforceable, that the NAF Code was part of the agreement, that NAF was unavailable to conduct the arbitration and that the Code allowed Appellee to then bring this action in a court of law.

This appeal followed.

> In reviewing an order denying enforcement of an arbitration agreement, the trial court's legal conclusions

> are reviewed *de novo* "to determine if the law was properly applied to the facts [;]" however, factual findings of the trial court "are reviewed under the clearly erroneous standard and are deemed conclusive if they are supported by substantial evidence."

Energy Home, Div. of S. Energy Homes, Inc. v. Peay, 406 S.W.3d 828, 833 (Ky. 2013) (citation omitted).

Appellants argue that the agreement did not require the NAF to participate in the arbitration; therefore, the FAA requires that the trial court appoint a different arbitrator. We disagree. What must be remembered is that arbitration agreements are contracts and we are required to enforce contracts according to their terms. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67, 130 S.Ct. 2772, 2776, 177 L.Ed.2d 403 (2010). "[C]ourts cannot make a new contract for the parties under the guise of interpretation or construction but must determine the rights of the parties according to the terms agreed upon by them." *Ritchie v. Turner*, 547 S.W.3d 145, 148 (Ky. App. 2018) (quotation marks and citation omitted).

Appellants are correct that the FAA does allow courts to substitute arbitrators if necessary, 9 U.S.C.A.[1] § 5 (West); however, we find that the terms of the agreement required the NAF to be the arbitrator and if it could not, then it allowed Appellee to pursue other legal remedies. As stated previously, the

[1] United States Code Annotated.

agreement incorporated the NAF Code into its terms and the Code provided that only the NAF would be allowed to administer the NAF Code of Procedure. Further, the Code allows the parties to seek "legal and other remedies" if the NAF is unable to arbitrate a dispute. Based on the clear terms of the contract, we agree with the trial court that Appellee was able to bring this cause of action in a court of law because the NAF was unable to arbitrate this case.

Appellants also argue that 9 U.S.C.A § 5 required the trial court to appoint a new arbitrator regardless of the terms of the NAF Code. They cite to case law from courts across the country regarding whether the named arbitrator is an integral part of the agreement rather than an ancillary logistical concern. *See Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217 (11th Cir. 2000); *Miller v. GGNSC Atlanta, LLC*, 323 Ga.App. 114, 746 S.E.2d 680 (2013); *Stewart v. GGNSC-Canonsburg, L.P.*, 2010 PA Super 199, 9 A.3d 215, 218-20 (2010). This is an issue of first impression in Kentucky.

Pursuant to 9 U.S.C.A § 5, the substitution of an arbitrator is only permitted if the named arbitrator is not an integral part of the arbitration agreement. "Only if the choice of forum is an integral part of the agreement to arbitrate, rather than an 'ancillary logistical concern' will the failure of the chosen forum preclude arbitration." *Brown*, 211 F.3d at 1222. We find that the NAF in this case was an integral part of the arbitration agreement. It is clear from the

terms of the agreement that the parties intended to arbitrate exclusively before the NAF. The NAF Code was incorporated into the agreement and pursuant to the terms of the Code, only the NAF could utilize it. Furthermore, at the bottom of the first page of the agreement is information regarding the NAF, its arbitration services, and the fees for said services. It is unlikely that this information regarding fees and services would have been included in the agreement if the parties intended to utilize other arbitrators.

Finally, while Appellants argue that this was a general agreement to arbitrate and that any arbitrator could be used, we find it unlikely that that was the intention when the parties entered into the agreement. Had the situation been reversed in that the NAF was available and Appellee requested a different arbitrator, it is doubtful that Appellants would have been willing to substitute a different arbitrator. The more likely scenario would be that Appellants would demand that Appellee be held to the clear terms of the agreement and be required to use the NAF.

The terms of the agreement are clear that the NAF was the sole arbitrator available in this case. Absent participation of the NAF, Appellee was free to bring the underlying claims in the circuit court; therefore, we affirm the judgment of the trial court.

ALL CONCUR.

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