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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-1161

Filed: 5 July 2017

Cumberland County, No. 16 CVS 524

LILLIE MCLAURIN, by and through MICHELLE NEWSOME, the Administratrix of the LILLIE MCLAURIN'S ESTATE, Plaintiff,

v.

MEDICAL FACILITIES OF NORTH CAROLINA, INC; and CAROLINA HEALTH CARE CENTER OF CUMBERLAND COUNTY, LIMITED PARTNERSHIP; and CAROLINA REHAB CENTER OF CUMBERLAND, INC., Defendants.

Appeal by Defendants from an order entered 20 June 2016 by Judge Gale M. Adams in Cumberland County Superior Court. Heard in the Court of Appeals 1 May 2017.

Brent Adams & Associates, by Brenton D. Adams, for Plaintiff-Appellee.

Cranfill Sumner & Hartzog LLP, by Jaye E. Bingham-Hinch, Katherine R. Hilkey-Boyatt, and Meredith Taylor Berard for Defendant-Appellants.

HUNTER, JR., Robert N., Judge.

Medical Facilities of North Carolina, Inc., Carolina Health Care Center of Cumberland County, Limited Partnership, and Carolina Rehab Center of Cumberland, Inc. (collectively "Defendants"), appeal the trial court's order denying

their motion to compel arbitration against Michelle Newsome (“Plaintiff”), in her representative capacity as Administratrix of Lillie McLaurin’s estate. Because our review of the record reveals Plaintiff did not have the authority to enter an arbitration agreement on McLaurin’s behalf, we affirm the trial court’s order.

I. Factual and Procedural Background

Plaintiff’s forecast of evidence tends to show Lillie McLaurin (“McLaurin”) fell in 2007 when she was approximately 81 years old. As a result of her fall, McLaurin underwent surgery. In 2007, McLaurin’s daughter, Plaintiff, admitted McLaurin to Defendant Carolina Rehab Center of Cumberland, Inc. (“the Center”). McLaurin was a long-term patient at the Center, and was under the Center’s care.

Defendants required Plaintiff to sign a form as a precondition to McLaurin’s admission to the Center. The Center titled this form “Business Contract” (“The Agreement”).¹ The Agreement designated McLaurin as “Resident” and Plaintiff as “Responsible Party.” Plaintiff signed all the admission paperwork. Under the Agreement, the Responsible Party accepted financial responsibility for McLaurin’s time at the Center.

The Agreement references a “Special Power of Attorney” Form:

In the event that the Resident does not have an appointed legal guardian or holder of a Power of Attorney of the Resident, the Resident shall appoint the Responsible Party, on the Healthcare Center’s Special Power of

¹ The parties, in their briefs, refer to this Business Contract as “the Agreement.”

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Attorney form as either Immediate or Conditional Power of Attorney (as appropriate), to conserve and protect the Resident's income and resources. . . . The choice of Responsible Party shall be in the sole discretion of the Resident and the Healthcare Center shall have no liability or responsibility for the acts or omissions of the Responsible Party.²

The Agreement contains a seven-part arbitration clause. Additionally, the Agreement specifies in Section IX:

BINDING EFFECT: This Business Contract shall be for the benefit of and shall be binding upon the parties hereto and their respective representatives, successors and permitted assigns. In the event Resident is medically incapable of understanding his/her rights or responsibilities created by this contract, or is otherwise unable to communicate, the Responsible Party agrees that his/her execution of this agreement is in his/her personal capacity and on behalf of Resident as Power of Attorney pursuant to the North Carolina Power of Attorney Statute (N.C. Gen. Stat. § 32A et seq.), or under other legal authority all as may be applicable.

While at the Center, McLaurin's condition deteriorated and she lost the ability to walk without assistance. On 27 July 2011, McLaurin left the Center. McLaurin re-entered the Center on 2 August 2011. When McLaurin returned to the Center, Plaintiff executed a "Readmission Agreement/Limited Scope of Practice" Form ("Readmission Agreement"). This form incorporates the terms of the original

² The record does not contain a signed copy of this "Special Power of Attorney Form," and the parties do not contend Plaintiff signed this form.

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Agreement. It also states the parties agree to remain bound under the Agreement's terms, "specifically including the Agreement's arbitration provisions."

On 3 May 2013, McLaurin fell at the Center. This second fall caused McLaurin's hip to fracture. She was 87 years old. As a result of this fall, McLaurin underwent surgery. McLaurin remained a resident at the Center, but fell "several" more times. These falls caused McLaurin "severe physical pain and suffering."

On 5 March 2014, McLaurin died.³

On 1 February 2016, Plaintiff filed a complaint against Defendants alleging (1) "Ordinary Negligence"; (2) "North Carolina Statutory and Regulatory Rights Violations"; (3) "Medical Malpractice"; and (4) "Wrongful Death."

On 24 March 2016, Defendants filed a motion to dismiss Plaintiff's claims. In the alternative, Defendants filed a motion to compel arbitration.

On 6 June 2016, the trial court conducted a hearing on Defendants' motion to dismiss and motion to compel arbitration. As to the issue of arbitration, Defendants argued the action was subject to a binding arbitration agreement, and Plaintiff executed this agreement when she admitted her mother into the Center. Defendants also argued Defendant Center made an offer to provide services to McLaurin, and Plaintiff, as the responsible party, accepted the Center's terms. Defendants

³ The record does not contain McLaurin's death certificate or otherwise indicate McLaurin's exact cause of death. Plaintiff's complaint alleges "[t]he negligence of the Defendants as alleged above and the breach of their duty to the Plaintiff's intestate as alleged herein was and is the cause of death of the late Ms. Lillie McLaurin."

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contended both parties mutually promised to waive the right to have a court decide their claims. Defendants also contended the scope of the arbitration agreement covered the current action. Finally, Defendants argued (1) Plaintiff was the responsible party; (2) Plaintiff executed all the admission paperwork; and (3) Plaintiff represented to Defendants she had the authority to execute the admission paperwork because Plaintiff's mother was "unable to [fill out the paperwork] herself."

Defendants included copies of the Agreement and the Readmission Agreement in their brief to the trial court supporting their motion to compel arbitration.

Plaintiff contended Defendants had the burden to show Plaintiff was the "duly-appointed, duly-authorized power of attorney for Ms. McLaurin at the time" Plaintiff entered into the contract with Defendants. Plaintiff also contended there was no evidence she executed a power of attorney for her mother.

In rebuttal, Defendants contended the arbitration agreement's language included the terms "power of . . . attorney or other legal authority[,]" and Plaintiff fell within the "other legal authority" category. Defendants also noted because North Carolina courts favor arbitration, the trial court should err on the side of enforcing arbitration.

The trial court concluded the hearing by stating, "I'll take both of these matters under advisement."

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The trial court entered its order on 20 June 2016. The trial court granted Defendants' motions to dismiss Plaintiff's second claim for relief (North Carolina Statutory and Regulatory Rights Violations) under Rule 12(b)(6) and Plaintiff's third claim (Medical Malpractice) for failure to comply with Rule 9(j) requirements. The trial court denied Defendants' motions to dismiss Plaintiff's other claims. Without entering any factual findings, the trial court concluded its order by stating, "[t]he Court additionally denies Defendant's Motion to Compel Arbitration."

On 15 July 2016, Defendants entered their notice of appeal.

II. Jurisdiction

A trial court's order denying a party's motion to arbitrate is interlocutory. *Terrell v. Kernersville Chrysler Dodge, LLC*, ___ N.C. App. ___, ___, 798 S.E.2d 412, 415 (2017). "However, an order denying arbitration is immediately appealable because it involves a substantial right, the right to arbitrate claims, which might be lost if appeal is delayed." *Munn v. Haymount Rehab. & Nursing Ctr., Inc.*, 208 N.C. App. 632, 636, 704 S.E.2d 290, 294 (2010) (quoting *Raper v. Oliver House, LLC*, 180 N.C. App. 414, 418-19, 637 S.E.2d 551, 554 (2006)).

III. Standard of Review

"[A] trial court's determination of whether a dispute is subject to arbitration is a conclusion of law that is reviewable *de novo* on appeal." *Raper v. Oliver House, LLC*, 180 N.C. App. 414, 419, 637 S.E.2d 551, 554 (2006). "A court empowered to hear

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a case *de novo* is vested with ‘full power to determine the issues and rights of all parties involved, and to try the case as if the suit had been filed originally in that court.’” *Caswell County v. Hanks*, 120 N.C. App. 489, 491, 462 S.E.2d 841, 843 (1995) (quoting *In Re Hayes*, 261 N.C. 616, 622, 135 S.E.2d 645, 649 (1964)).

IV. Analysis

As an initial matter, we acknowledge the trial court failed to enter findings of fact and conclusions of law concerning the validity of an arbitration agreement. We also acknowledge it is this Court’s established practice to remand an action to the trial court when that court fails to enter findings of fact and conclusions of law concerning this issue. *See, e.g., Terrell* at ___, 798 S.E.2d at 416 (“When a trial court fails to include findings of fact in its order, this Court has repeatedly reversed and remanded to the trial court for a new order containing requisite findings.”); *Cornelius v. Lipscomb*, 224 N.C. App. 14, 16-17, 734 S.E.2d 870, 871-72 (2012) (reversing and remanding because the trial court’s order “contains no findings whatsoever” and fails to “identify any basis” on which to compel or deny arbitration); *Griessel v. Temas Eye Ctr., P.C.*, 199 N.C. App. 314, 317, 681 S.E.2d 446, 448 (2009) (reversing and remanding “for entry of findings of fact” because “the trial court made no finding of fact as to the existence of a valid agreement to arbitrate”); *Pineville Forest Homeowners Ass’n v. Portrait Homes Constr. Co.*, 175 N.C. App. 380, 387, 623 S.E.2d 620, 625 (2006) (reversing and remanding to the trial court for “a new order

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containing findings which sustain its determination regarding the validity and applicability of the arbitration provisions”).

However, in this particular circumstance, the record reveals no material issues of fact. The record also contains all the documents pertinent to this action. The terms of the Agreement and the Readmission Agreement are unambiguous. Therefore, in the interest of judicial efficiency, we elect to conduct a *de novo* review of the plain record to determine whether McLaurin gave Plaintiff the authority to enter into an arbitration agreement on her behalf. *See Premier, Inc. v. Peterson*, 232 N.C. App. 601, 605, 755 S.E.2d 56, 59 (2014) (“In a contract dispute between two parties, the trial court may interpret a plain and unambiguous contract as a matter of law if there are no genuine issues of material fact.”).

Defendants contend the trial court erred in denying their motion to compel arbitration because the parties had a valid arbitration agreement. We conclude the act of signing an admission agreement on behalf of a resident, and agreeing to act as the “Responsible Party,” does not entitle the signer to waive a resident’s right to trial. We therefore affirm the trial court’s order denying arbitration.

Generally, our State’s public policy favors arbitration. *Johnston County v. R.N. Rouse & Co.*, 331 N.C. 88, 91, 414 S.E.2d 30, 32 (1992). However, “this public policy does not come into play unless a court first finds that the parties entered into an enforceable agreement to arbitrate.” *Evangelistic Outreach Ctr. v. General Steel*

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Corp., 181 N.C. App. 723, 726, 640 S.E.2d 840, 843 (2007) (quoting *Sears Roebuck & Co., v. Avery*, 163 N.C. App. 207, 211, 593 S.E.2d 424, 428 (2004)). “The law of contracts governs the issue of whether there exists an agreement to arbitrate.” *Routh v. Snap-On Tools Corp.*, 108 N.C. App. 268, 271, 423 S.E.2d 791, 794 (1992). “Accordingly, the party seeking arbitration must show that the parties mutually agreed to arbitrate their disputes.” *Id.* at 271-72, 423 S.E.2d at 794.

Under our case law, Plaintiff could bind McLaurin to arbitration if McLaurin had appointed Plaintiff to serve as McLaurin’s attorney-in-fact. *Raper* at 422, 637 S.E.2d at 556. In *Raper*, the trial court entered an “uncontested finding of fact that plaintiff held decedent’s power of attorney.” *Id.* at 422, 637 S.E.2d at 556. This Court stated:

It is well established that a contract is enforceable against a party who signs the contract. Plaintiff signed the Agreement as the Responsible Party and as decedent’s attorney-in-fact. The Agreement and its arbitration clause is enforceable and provides an arbitral forum to resolve all claims or disputes arising under the parties’ contract.

Id. at 422, 637 S.E.2d at 556. Unlike *Raper*, the parties here do not contend, nor does the record indicate, Plaintiff held power of attorney for McLaurin pursuant to Chapter 32A of the North Carolina General Statutes. The record also fails to show Plaintiff executed the Center’s “Special Power of Attorney” form.⁴

⁴ Because Plaintiff did not execute the Center’s “Special Power of Attorney Form,” we need not address whether that form confers the same legal authority as the statutory power of attorney provided in N.C. Gen. Stat. § 32A *et seq.*

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Defendants assert Section IX of the Agreement conferred legal authority to Plaintiff to bind McLaurin to an arbitration agreement. We disagree. The plain language of Section IX states it applies “in the event” McLaurin is incapable of understanding her “rights and responsibilities” under the Agreement, or if McLaurin is “otherwise unable to communicate.” There is no evidence in the record to indicate McLaurin was either incapable of communicating or of understanding her rights under the Agreement at the time Plaintiff signed the Agreement. Additionally, Section IX contains a “catch-all” phrase stating the Responsible Party executes the Agreement under “other legal authority as may be applicable.” While this language may be sufficient to ensure Plaintiff’s financial responsibilities under the Agreement, it does not confer upon Plaintiff the legal authority to waive McLaurin’s right to trial.⁵

Defendants next contend Plaintiff had authority to act as McLaurin’s agent when she assumed the position of Responsible Party under the Agreement. This Court held there are two essentials in establishing a principal-agent relationship:

(1) Authority, either express or implied, of the agent to act for the principal, and (2) the principal’s control over the agent. . . . An agency can be proved generally, by any fact or circumstance with which the alleged principal can be connected and having a legitimate tendency to establish that the person in question was his agent for the performance of the act in controversy[.]

⁵ Plaintiff’s signing the Readmission form does not alter our analysis. That form reiterates the terms of the original Agreement and does not confer additional legal rights upon Plaintiff to authorize her to waive McLaurin’s right to trial.

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Munn at 637-38, 704 S.E.2d at 295 (quoting *Colony Assocs. v. Fred L. Clapp & Co.*, 60 N.C. App. 634, 637-38, 300 S.E.2d 37, 39 (1983)).

In determining the existence of an actual agency relationship, this Court looks to whether the evidence shows a principal actually consented to having an agent act on his behalf. *Munn* at 638, 704 S.E.2d at 295. “Actual authority may be implied from the words and conduct of the parties and the facts and circumstances attending the transaction in question.” *Id.* at 638, 704 S.E.2d at 295 (quoting *Harris v. Ray Johnson Constr. Co.*, 139 N.C. App. 827, 830, 534 S.E.2d 653, 655 (2000)). There is no indication under our review of the record McLaurin gave Plaintiff the authority to enter an arbitration agreement on her behalf. Defendants do not show how either the “words and conduct of the parties” or the “facts and circumstances” of this case illustrate McLaurin’s express or implied authorization of Plaintiff to contract away McLaurin’s right to trial. *Id.* at 638, 704 S.E.2d at 295. Plaintiff signed the Center’s admission forms. Under the Agreement, Plaintiff assented to the Center’s allocation of financial responsibility to Plaintiff. Without evidence of Plaintiff assuming statutory power of attorney, we cannot conclude McLaurin actually consented to Plaintiff acting on her behalf so as to agree to an arbitration provision. *See Raper*, 180 N.C. App. at 422, 637 S.E.2d at 556.

As to whether Plaintiff had apparent authority to act as McLaurin’s agent, this Court considers “what authority the third person in the exercise of reasonable care

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was justified in believing that the principal had, under the circumstances, conferred upon his agent.” *Munn* at 639, 704 S.E.2d at 295 (quoting *Heath v. Craighill, Rendleman, Ingle & Blythe*, 97 N.C. App. 236, 242, 388 S.E.2d 178, 182 (1990)). Plaintiff’s execution of the Agreement on McLaurin’s behalf shows McLaurin authorized Plaintiff to commit McLaurin to the Center. It also shows Plaintiff agreed to assume McLaurin’s financial responsibility. However, Plaintiff’s signing the Agreement and the Readmission Form does not show McLaurin authorized Plaintiff to assume McLaurin’s authority to enter into an arbitration agreement. Defendants cannot rely on Plaintiff’s position as Responsible Party to extend to matters requiring legal authority, such as power of attorney. Additionally, Defendants possessed a “Special Power of Attorney” form which the Center did not require Plaintiff to execute.

This Court has previously held a Responsible Party lacks actual or apparent authority to legally bind a resident to an arbitration clause contained within an admission contract. *Munn* at 641, 704 S.E.2d at 297. This Court concluded:

The fact that Ms. Munn signed documents for the admission and treatment of Ms. Murphy in no way indicates she was Ms. Murphy’s agent, as it does not indicate any manifestation of authority by Ms. Murphy. As noted above, “[a]gency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.” Ms. Murphy never manifested any form of consent which indicated that Ms. Munn was acting as her agent.

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Id. at 641, 704 S.E.2d at 297 (citation omitted). Here, as in *Munn*, Plaintiff signed an admission document. Plaintiff, under the Agreement, became the Responsible Party. There is no evidence Plaintiff's responsibility extended beyond a financial obligation to the Center to pay for the services the Center rendered McLaurin. There is also no evidence McLaurin consented to Plaintiff having authority to waive McLaurin's right to trial. Because McLaurin did not either expressly or implicitly grant Plaintiff the legal authority to enter an arbitration agreement on her behalf, we decline to find a principal-agent relationship, either actual or apparent, in this circumstance.

In this case there are no material issues of fact and the terms of the Agreement and the Readmission Agreement are unambiguous. Additionally, the parties do not contend Plaintiff holds power of attorney for McLaurin. Therefore, under our *de novo* review, we conclude Plaintiff did not have the authority to enter into an arbitration agreement on McLaurin's behalf. Accordingly, we affirm the trial court's order denying Defendants' motion to compel arbitration.

AFFIRMED.

Chief Judge MCGEE and Judge ZACHARY concur.

Report per Rule 30(e).