

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

LORETTA M. JOE, ADMINISTRATRIX OF
THE ESTATE OF MARGARET A.
MCKELVEY,

Appellee

v.

MERCY FITZGERALD HOSPITAL AND
MERCY PHILADELPHIA HOSPITAL AND
MERCY HEALTH SYSTEM AND MANOR
CARE HEALTH SERVICES AT MERCY
FITZGERALD AND HCR MANOR CARE,
INC.,

Appellants

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 2001 EDA 2012

Appeal from the Order of June 12, 2012,
in the Court of Common Pleas of Philadelphia County,
Civil Division at No. 002785 October Term, 2011

BEFORE: BENDER, LAZARUS AND COLVILLE*, JJ.

MEMORANDUM BY COLVILLE, J.:

Filed: March 12, 2013

This is an appeal from an order overruling a preliminary objection brought pursuant to Pa.R.C.P. 1028(b)(6). We affirm.

The trial court summarized the background underlying this matter in the following manner.

Plaintiff Loretta M. Joe, Administratrix of the Estate of Margaret McKelvey (hereinafter "Plaintiff"), commenced this action on October 21, 2011 against Mercy Health System (hereinafter "MHS"); Mercy Philadelphia Hospital (hereinafter "MPH"); Mercy

*Retired Senior Judge assigned to the Superior Court.

Fitzgerald Hospital (hereinafter "MFH"); HCR Manor Care, Inc. (hereinafter "HCR") and Manor Care Health Services at Mercy Fitzgerald (hereinafter "Manor Care") following the death of Margaret A. McKelvey (hereinafter "decedent").

On December 11, 2009, decedent was admitted to MHP for evaluation of an infected left heel with gangrene where it was determined decedent's left foot was not salvageable, and decedent was evaluated for probable below the knee amputation. The post-operative pathology revealed gangrene of left foot with a deep and large ulcer of the heel, acute and chronic periositis [sic] and severe peripheral vascular disease. Additionally, it was noted decedent was suffering from sacral decupitus [sic] ulcer (hereinafter "ulcer").

On December 23, 2009, decedent was discharged from MHP and returned to Manor Care. Upon readmission, decedent's alleged husband, Leroy Pennycooke (hereinafter "Pennycooke"), executed the Arbitration Agreement (hereinafter ["the Agreement"]), in the space designated "Patient's Legal Representative in his/her Representative Capacity." The Agreement contains a mandatory arbitration clause, as follows:

This Agreement made on 12/23/09 (date) by and between the Parties, Patient Margaret McKelvey and/or Patient's Legal Representative Leroy Pennycooke (collectively referred to as "Patient"), and the Center Mercy Fitzgerald is an Agreement intended to require that **Disputes** be resolved by arbitration. The Patient's Legal Representative agrees that he is signing this Agreement as a Party, both in his representative and individual capacity.

At such time, it is uncontested Pennycooke held no power of attorney and had not been appointed decedent's legal guardian.

On February 11, 2010, decedent underwent a debridement of the ulcer, at which time sepsis was noted likely due to the infected ulcer. On March 24, 2010, a subsequent sacral debridement was performed on decedent, at which time skin, muscle, fascia and bone were removed. Another debridement of the sacral wound occurred on April 15, 2010. Post-operative diagnosis was "Stage IV, huge sacral decubitus involving the bone of the sacrum." Decedent passed away on April 24, 2010,

cause of death noted as “septic shock due to end stage sacral decubitus ulcer due to peripheral vascular disease.”

Plaintiff then initiated the instant suit. Defendants Manor Care and HCR (collectively “Defendants”) filed preliminary objections on March 20, 2012, to which Plaintiff filed an Amended Complaint on April 5, 2012. Thereafter, Defendants filed the instant Preliminary Objections on April 25, 2012, seeking, in part, to enforce [the Agreement].^[1] Plaintiff responded the arbitration clause was invalid because, *inter alia*, Pennycooke did not have legal authority to enter into an arbitration agreement that would bind decedent and her heirs as he was neither decedent’s attorney-in-fact nor her personal representative.

On June 12, 2012, [the trial court] overruled Defendants’ Preliminary Objections[.] Defendants timely filed an appeal^[2]

Trial Court Opinion, 09/10/12, at 1-3 (emphasis in original) (footnotes omitted).

In their brief to this Court, Defendants ask us to consider the following question:

1. Whether the [t]rial [c]ourt erred in holding that [decedent’s] husband, Leroy Pennycooke, did not have authority to sign the Arbitration Agreement on her behalf, where he repeatedly signed healthcare documents on her behalf over the course of the months at issue, and where she was incapacitated to do so

¹ Defendants brought their preliminary objection regarding the agreement to arbitrate pursuant to Pa.R.C.P. 1028(a)(6), which allows a party to assert the existence of an agreement to arbitrate.

² The trial court’s order is immediately appealable inasmuch as it overruled Defendants’ preliminary objection brought pursuant to Pa.R.C.P. 1028(a)(6). *Midomo Co., Inc. v. Presbyterian Housing Development Co.*, 739 A.2d 180, 182-84 (Pa. Super. 1999).

herself, and where neither she, nor anyone else, disavowed Manor Care of the reasonable belief that he had such authority.

Defendants' Brief at 4.

In the relevant portion of their preliminary objections, Defendants averred that Leroy Pennycooke was decedent's husband and that Mr. Pennycooke signed the Agreement on decedent's behalf, binding decedent and her heirs to arbitrate disputes with Defendants. Defendants averred that they reasonably relied on Mr. Pennycooke's representations and that Mr. Pennycooke had apparent authority to act on decedent's behalf. In her response to Defendants' preliminary objections, Plaintiff contended that Defendants did not have the right to rely on Mr. Pennycooke's actions and that he had no authority to sign any agreement binding decedent or her heirs.

In overruling Defendants' preliminary objection, the trial court determined that Defendants failed to provide sufficient evidence that Mr. Pennycooke had the authority to bind decedent to arbitration. Thus, the court implicitly determined that the Agreement is invalid.

On appeal, Defendants maintain that the trial court erred by overruling their preliminary objection because Mr. Pennycooke had the apparent authority to execute the Agreement. Plaintiff contends that the court properly overruled the preliminary objection because Mr. Pennycooke had no such authority. Additionally, Defendants contend that the court erred by overruling their preliminary objection because Plaintiff is estopped from

denying that Mr. Pennycooke lacked the authority to bind decedent to the Agreement.

As an initial matter, Defendants' preliminary objection brought pursuant to Pa.R.C.P. 1028(a)(6) made no mention of Plaintiff being estopped from denying that Mr. Pennycooke lacked the authority to bind decedent to the Agreement. They also failed to raise such an issue in their statement filed pursuant to Pa.R.A.P. 1925(b). Consequently, Defendants have waived this portion of their issue. Pa.R.A.P. 1925(b)(4)(vii); **see** Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.").

In terms of the remainder of Defendants' issue, we note that "[t]o determine whether the claim is subject to arbitration the court engages in a two-prong analysis. First, does a valid agreement exist and second is the dispute within the scope of the agreement." ***In re Adoption of M.M.H.***, 981 A.2d 261, 266 (Pa. Super. 2009) (citation omitted). The parties agree that the dispute is within the scope of the Agreement. Plaintiff, however, claims that the Agreement is invalid because Mr. Pennycooke did not have the authority to bind decedent to the Agreement. Defendants assert that Mr. Pennycooke had the apparent authority to act on decedent's behalf and that the Agreement, therefore, is valid.

The ultimate issue in this case is an issue of fact, namely, whether Mr. Pennycooke had the apparent authority to bind decedent to the Agreement. ***Turner Hydraulics, Inc. v. Susquehanna Const. Corp.***, 606 A.2d 532, 535 (Pa. Super. 1992) ("The nature and extent of an agent's authority is a

question of fact for the trier. Also, the trier-of-fact is to evaluate the conduct of the parties in light of all the circumstances in determining the existence of apparent authority.”). If an issue of fact is raised by a preliminary objection, “the court shall consider evidence by depositions or otherwise.” Pa.R.C.P. 1028(c)(2); *see Note* to Pa.R.C.P. 1028(c)(2) (“Preliminary objections raising an issue under[, *inter alia*, Pa.R.C.P.(a)(6)] cannot be determined from facts of record. . . .”). “In the past, both the Supreme Court and this Court have said that where facts are controverted, the trial court must ‘resolve the dispute by receiving evidence thereon through interrogatories, depositions or an evidentiary hearing.’” ***Slota v. Moorings, Ltd.***, 494 A.2d 1, 3-4 (Pa. Super. 1985) (citations omitted); *see Stern v. Prudential Financial, Inc.*, 836 A.2d 953, 955 (Pa. Super. 2003) (“Issues such as . . . whether there was actual or apparent authority to make such statements can be resolved only after fuller exposition at a hearing or depositions.”) (footnote omitted).

Because Defendants asserted that Mr. Pennycooke had an agency relationship with decedent, they carried the burden of establishing the existence of that relationship. ***See Basile v. H & R Block, Inc.***, 761 A.2d 1115, 1120 (Pa. 2000) (“The burden of establishing an agency relationship rests with the party asserting the relationship.”). We agree with the trial court’s conclusion that Defendants failed to provide sufficient evidence to prove the existence of an alleged agency relationship between Mr. Pennycooke and decedent. Indeed, Defendants failed to offer any evidence, such as a deposition, in support of their claim that this relationship existed. Instead, they simply supported this claim by relying on the averments in

their preliminary objections. For these reasons, we affirm the trial court's order.

Order affirmed.