

RENDERED: APRIL 10, 2009; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000604-MR

BEVERLY HEALTH AND REHABILITATION
SERVICES, INC. d/b/a MT. HOLLY NURSING
CENTER; BEVERLY ENTERPRISES, INC.;
BEVERLY CALIFORNIA CORP.; BEVERLY
ENTERPRISES - KENTUCKY, INC; AND
RENAY ADKINS IN HER CAPACITY AS
ADMINISTRATOR OF MT. HOLLY NURSING
CENTER

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
ACTION NO. 06-CI-010226

LUCY SMITH, AS THE ADMINISTRATRIX
OF THE ESTATE OF SYLVESTER SMITH, JR.,
DECEASED

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: DIXON, KELLER, AND WINE, JUDGES.

WINE, JUDGE: Beverly Health and Rehabilitation Services, Inc., d/b/a Mt. Holly
Nursing Center (“Mt. Holly”), et al., appeal from the Jefferson Circuit Court’s

order denying its motion to compel arbitration.¹ For the reasons set forth herein, we affirm the trial court's order.

Lucy Smith ("Smith") is the executrix of the estate of her deceased husband, Sylvester Smith ("Sylvester"). On or about November 15, 2006, Sylvester's estate commenced an action against Mt. Holly alleging claims of negligence, negligence *per se*, breach of contract, fraud, breach of fiduciary duty, gross negligence, wrongful death, and punitive damages.

Prior to his death, Sylvester suffered from blindness, colon cancer, and Alzheimer's Disease. Sylvester's doctors recommended he be admitted to a nursing home due to his failing health. Based on those recommendations, Smith and the couple's daughter, Deborah Thomas ("Thomas"), decided to place Sylvester at Mt. Holly. Smith had handled Sylvester's business affairs for at least the previous five years due to his failing health conditions. In addition, Smith was the named power of attorney for her husband.

On May 1, 2003, the date Sylvester was admitted to Mt. Holly, Thomas went ahead to Mt. Holly while her mother and father were in route from the hospital. While waiting, the admissions director, Maggie Claire Stearman ("Stearman"), urged Thomas to execute various documents required for her father's admission to the facility. Thomas informed Stearman that she did not have

¹ Even though the opinion and order of the circuit court does not contain the language of finality under Kentucky Rules of Civil Procedure ("CR") 54.02, we believe by operation of law, Kentucky Revised Statutes ("KRS") 417.220, the omission has no effect on a party's ability to appeal this order. *See Valley Construction Co., Inc. v. Perry Host Management Co., Inc.*, 796 S.W.2d 365 (Ky. App. 1990).

authority to sign on behalf of Sylvester because her mother was the power of attorney for her father. It is conceded that Thomas did not present paperwork indicating her mother was the power of attorney. Nevertheless, Stearman assured Thomas that she could sign the papers and urged Thomas that the papers had to be signed in order to secure the last available bed for her father. Finally, Stearman assured Thomas that signing the papers would not impose any responsibility on her personally. Based on these representations, Thomas signed the admissions documents for her father. Among other papers, Thomas signed a document entitled, “Resident and Facility Arbitration Agreement (Not a Condition of Admission – Read Carefully).”

Sylvester remained a resident of Mt. Holly until November 30, 2005. He died on December 6, 2005. His estate alleges that his death was caused/hastened by negligent treatment he received while at Mt. Holly. Upon commencement of this action, Mt. Holly sought to enforce the arbitration agreement by filing a motion to compel arbitration pursuant to Kentucky Revised Statutes (“KRS”) 417.050 and KRS 417.060. The trial court denied Mt. Holly’s motion, holding that the nursing home admission papers containing an arbitration agreement are not binding because they were not signed by either Sylvester or Smith, who had his power of attorney. This appeal followed.

Because KRS 417.220(1) provides that “[a]n appeal may be taken from: (a) [a]n order denying an application to compel arbitration . . .”, Mt. Holly is entitled to bring an immediate appeal. *Drees Co. v. Osburg*, 144 S.W.3d 831 (Ky.

App. 2003). On appeal, this Court's review is *de novo*, except that findings of fact are reviewed for clear error only. *Conseco Finance Servicing Corp. v. Wilder*, 47 S.W.3d 335, 340 (Ky. App. 2001); *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001).

Mt. Holly argues that Sylvester's estate is bound by the arbitration agreement because it, as a third-party beneficiary to the contract, received the full benefit of the agreements by Sylvester's admission to Mt. Holly. Consequently, Mt. Holly maintains that Sylvester's estate is estopped from denying the validity of the arbitration agreement. We disagree.

By definition, third party beneficiaries are "strangers to the contract." *See Sexton v. Taylor County*, 692 S.W.2d 808, 810 (Ky. App. 1985). Neither Sylvester nor Smith were strangers to the contract. Rather, Sylvester would have been a party to the contract through the purported authority of his agent, Thomas. Thus, the law of third party beneficiaries is inapplicable in this case. However, Mt. Holly concedes that Thomas was not acting as her father's agent when she signed the arbitration agreement. Therefore, no contract was ever created. *See Bottoms v. Bottom*, 880 S.W.2d 559, 561 (Ky. App. 1994) ("It is a well-known principle of the law of agency that for the principal to be bound by the act of the agent, the latter must have acted with either the express or implied authority of his principal . . .").

Here, Thomas informed Stearman that she did not have the authority to bind her father and did not handle his affairs. During oral arguments, Mt. Holly essentially argued that it would not accept Thomas's word that she was not the

power of attorney for her father. However, when Smith arrived with Sylvester later that day claiming to be his power of attorney, but not showing proof, Mt. Holly accepted her word that she was a power of attorney by allowing her to sign additional paperwork for her husband. Specifically, Smith signed as power of attorney on the paperwork regarding payment. It makes no sense that Mt. Holly would push Thomas to sign, even as she protested that she did not have the authority to do so, and then accept Smith's assertion that she is power of attorney without documentation showing proof.

Further, Mt. Holly's reliance on *Olshan Foundation v. Otto*, 276 S.W.3d 827(Ky. App. 2009), is distinguishable from this case as it was clearly established that Otto was a third party beneficiary.

“A written agreement to submit any existing controversy to arbitration or a provision in written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law for the revocation of any contract.” KRS 417.050. To determine if an arbitration agreement is enforceable, we rely on “rudimentary principles governing contract law.” *General Steel Corp. v. Collins*, 196 S.W.3d 18, 20 (Ky. App. 2006). Where there is no ambiguity, a contract is to be strictly enforced according to its terms, which are to be interpreted by assigning language its ordinary meaning and without resort to extrinsic evidence. *Island Creek Coal Co. v. Wells*, 113 S.W.3d 100, 104 (Ky. 2003). The record is devoid of evidence indicating that Thomas had the authority to sign on behalf of her father. Thus,

there is no binding, written contract with regard to the arbitration agreement.

Mt. Holly's citations to *JP Morgan Chase & Co. v. Conegie, ex rel. Lee*, 492 F.3d 596 (5th Cir. 2007), and *Alterra Healthcare Corp. v. Estate of Linton ex rel. Graham*, 953 So.2d 574 (Fla. App. 2007), are misplaced. Both of these cases are distinguishable from the facts of this case because they involve agents who were authorized to enter into the arbitration agreement on behalf of the principal.

Further, Mt. Holly's assertion that Sylvester received the full benefit of the agreements by his admission to Mt. Holly is flawed. The arbitration agreement plainly states that the execution of the arbitration agreement was not a precondition to the admission of the patient or services rendered to the patient. Consequently, Sylvester derived no benefit from the arbitration agreement, and his estate is not bound by the agreement signed by Thomas.

Having found that there is no binding, written contract with regard to the arbitration agreement, we need not address Mt. Holly's additional arguments that the arbitration agreement was not unconscionable or ambiguous.

Accordingly, the order of the Jefferson Circuit Court denying Mt. Holly's motion to compel arbitration is affirmed.

ALL CONCUR.

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