RENDERED: JULY 10, 2015; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001901-MR

KINDRED HEALTHCARE, INC.;
KINDRED NURSING CENTERS
LIMITED PARTNERSHIP D/B/A
KINDRED TRANSITIONAL CARE
AND REHABILITATION - ROSEWOOD
F/K/A ROSEWOOD HEALTH CARE
CENTER; KINDRED NURSING CENTERS EAST, LLC;
KINDRED HOSPITALS LIMITED PARTNERSHIP;
KINDRED HEALTHCARE OPERATING, INC.; AND
KINDRED REHAB SERVICES, INC.
D/B/A PEOPLEFIRST REHABILITATION — APPELLANTS

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE JOHN R. GRISE, JUDGE
ACTION NO. 12-CI-01520

CLIFF FIELDS, AS ADMINISTRATOR OF
THE ESTATE OF JIMMY FIELDS — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, D. LAMBERT, AND THOMPSON, JUDGES.

DIXON, JUDGE: Kindred Healthcare, Inc. and associated entities (collectively "Kindred") appeals from an order of the Warren Circuit Court denying its motion to compel arbitration of claims brought by Appellee, Jimmy Fields. After careful review of the record, we affirm.

BACKGROUND

Fields was released from the Greenview Regional Hospital ("Greenview") and was admitted as a resident of Rosewood Health Care Center ("Rosewood") on October 24, 2011. Fields' hospital discharge record indicates that he was opposed to the decision to be taken to Rosewood.[1] Nevertheless, Fields was taken to Rosewood. Fields signed a discharge form that day with his full signature.

When Fields arrived at Rosewood, a representative, Sherri Taylor, assisted him with his admission paperwork. Taylor described Fields as "disgruntled." Among the paperwork was an Alternative Dispute Resolution Agreement (hereinafter "agreement"). The agreement is signed by Taylor. Fields' signature line is marked with an 'X.' Taylor testified that she explained the agreement to Fields, and that Fields told her that he was unable sign his name and could only mark with an 'X.' Fields testified that he did not wish to be admitted at Rosewood. He denied consenting to the agreement, and testified that he did not sign the agreement or mark the 'X.'

[1] A physician noted, "[H]is only option is Rosewood. He is currently refusing that option."

On October 26, 2012, Fields brought the instant suit against Kindred in the Warren Circuit Court, alleging negligent care. Kindred filed a motion to compel arbitration on February 4, 2013. The trial court granted the parties a period of time to conduct discovery. Following a hearing, the trial court denied Kindred's motion. It held that the 'X' was insufficient to qualify as a signature proving Fields' present intention to authenticate the agreement. The trial court found that Kindred did not satisfy its burden of demonstrating *prima facie* evidence of an agreement.

Kindred now appeals from the trial court's order denying its motion to compel arbitration. Ordinarily, such orders are interlocutory and are not immediately appealable. However, an order denying a motion to compel arbitration is an exception and 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 Kentucky Uniform Arbitration Act (KUAA), KRS 417.045 *et seq.,* and the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 *et seq.*

On September 17, 2014, this appeal was held in abeyance due to Fields' death. Counsel for Fields moved to return the appeal to this Court's active docket to substitute Cliff Fields, as Administrator of the Estate of Jimmy Fields, as the party-appellee. On January 6, 2015, this Court granted the motion.

STANDARD OF REVIEW

In reviewing an order denying enforcement of an arbitration agreement, the trial court's findings of fact are reviewed under the clearly erroneous standard and are deemed conclusive if they are supported by substantial evidence. *Padgett v. Steinbrecher*, 355 S.W.3d 457, 459 (Ky. App. 2011). The trial court's legal conclusions are reviewed *de novo* to determine if the law was properly applied to the facts. *Id*. The party seeking to enforce an arbitration agreement has the burden of establishing its existence, but once *prima facie* evidence of the agreement has been presented, the burden shifts to the party seeking to avoid the agreement. *Valley Construction Co., Inc. v. Perry Host Management Co., Inc.*, 796 S.W.2d 365, 368 (Ky. App. 1990).

ANALYSIS

First, Kindred alleges that the trial court acted contrary to public policy because the FAA, the KUAA, and the Kentucky Constitution, favor the enforcement of arbitration agreements. While it is true that any doubts regarding the scope of arbitration should be resolved in favor of arbitration, the existence of a valid arbitration agreement is a threshold matter to be resolved by court. *General Steel Corp. v. Collins*, 196 S.W.3d 18, 20 (Ky. App. 2006). The court must determine whether the parties have agreed to arbitrate based on the principles of contract law. *Id*. Applying these principles, the trial court found the evidence to be insufficient to prove that Fields consented to the agreement. We hold that the trial court did not deviate from the standard of reviewing the validity of arbitration agreements by evaluating whether a valid agreement exists as a threshold issue.

Arguing that Kentucky law recognizes that a party may sign and be bound by a signature with a mark, Kindred claims that the agreement marked with an 'X' in this case was sufficient *prima facie* evidence of a valid agreement. While it is true that a mark can qualify as a signature on an agreement, whether the mark is a valid signature is a question of fact based upon weighing the evidence. *See Conley v. Coburn*, 297 Ky. 292, 179 S.W.2d 668 (1944). Even if Fields marked the 'X,' which he denies, this does not automatically qualify as a signature, absent supporting facts.

Kindred argues that the facts support a finding that the 'X' is a valid signature demonstrating Fields' present intention to enter into the agreement. As evidence, Kindred notes Fields admitted that no one prevented him from reading the agreement, and further, that he acknowledged that he did not read the agreement or ask questions about it. Kindred cites to *Morgan v. Mengel Co.*, 195 Ky. 545, 242 S.W. 860 (1922), wherein an individual who signed a contract was not permitted to void it on the basis that he had not read it or knew its stipulations.

We agree with the trial court that the facts cited by Kindred do not suggest that the 'X' was a manifestation of Fields' present intention to consent to the agreement. The holding in *Morgan* is not germane to the instant matter. In *Morgan*, there was no dispute as to whether the parties signed the agreement. By contrast, the issue in the instant matter concerns whether Fields signed the contract. Fields does not allege that the agreement is invalid because he did not read or understand it. Herein, the court found that Fields was not functionally illiterate or

physically incapable of signing his name—the usual reasons for signing with an "X" to indicate assent. The trial court, in a thoughtful and well-reasoned opinion concluded that Kindred presented insufficient evidence to show there was a meeting of the minds and could not, therefore, determine that Fields consented to the arbitration agreement. We conclude there was sufficient evidence to support the trial court's determination on this issue.

Next, Kindred argues that the terms of the agreement allowed Fields to revoke the contract within thirty days. As such, Kindred contends that if Fields had no present intention to be bound by the contract, he could have revoked it. Thus, because Fields never revoked the agreement, he must have intended to be bound by it. We disagree.

Kindred's argument mistakenly assumes *prima facie* evidence of an agreement. If Fields never entered into the agreement, then he would have no need to revoke an agreement that was never made. As such, the fact that Fields took no action to revoke the agreement is irrelevant to the issue of whether *prima facie* evidence exists.

Kindred also argues that three people witnessed Fields execute the admission documents, including the agreement, with an 'X.' Contrary to Kindred's assertion, while some admission documents include the signatures of two additional witnesses, the alternative dispute resolution agreement does not. Thus, the trial court did not err in finding the absence of additional witnesses.

Next, Kindred asserts that the circuit court erred as a matter of law by effectively requiring that Kindred prove Fields' acquiescence to the contract above and beyond *prima facie* evidence. Kindred relies on *Dutschke v. Jim Russell Realtors, Inc.*, 281 S.W.3d 817, 824 (Ky. App. 2008), holding that the standard for evaluating validity of an arbitration clause does not require an affirmative demonstration that the contract was freely, voluntarily, and knowingly entered into. Kindred misconstrues *Dutschke,* however. Like *Morgan*, *Dutschke* also involves an arbitration agreement that was signed by the parties involved, and there was no dispute as to whether *prima facie* evidence of a valid agreement existed.

Here, the trial court found that the arbitration agreement was not valid **because** *prima facie* evidence of Fields' consent did not exist. It determined that because Fields had the ability to sign his full name, chose not to, and no additional witnesses attested to his signature, there was insufficient evidence in the record to demonstrate that the "vague mark" on the agreement represented a true meeting of the minds. We hold that there is substantial evidence to support the trial court's finding. Fields' behavior was consistent with his testimony that he did not want to be admitted at Rosewood. Perhaps most telling is that fact that Fields signed his full name on his discharge records from Greenview Hospital the same day as his alleged 'X' signature. Regardless of whether it was Fields who marked the 'X' on the arbitration agreement, the fact that he consciously chose to not sign his full name when he had the ability to do so strongly suggests that he did not consent to its terms. As such, we affirm the trial court.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Donald L. Miller, II
Jan G. Ahrens
Kristin M. Lomond
Louisville, Kentucky

BRIEF FOR APPELLEE:

Brian M. Jasper
Robert E. Salyer
Lexington, Kentucky

Taylor Payne
Assistant Attorney General
Frankfort, Kentucky