RENDERED: MAY 19, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2015-CA-000158-MR

RICHMOND HEALTH FACILITIES - MADISON LP; PREFERRED CARE OF DELAWARE, INC. D/B/A PREFERRED CARE, INC.; PREFERRED CARE PARTNERS MANAGEMENT GROUP, LP; KENTUCKY PARTNERS MANAGEMENT GROUP, LLC; AND ROY T. BABER, IN HIS CAPACITY AS ADMINISTRATOR OF MADISON HEALTH AND REHABILITATION CENTER — APPELLANTS

APPEAL FROM MADISON CIRCUIT COURT
v. HONORABLE WILLIAM G. CLOUSE JR., JUDGE
ACTION NO. 13-CI-00276

MAURICE CURRY; EXTENDICARE, INC.; EXTENDICARE, L.P.; EXTENDICARE HOMES, INC.; FIR LANE TERRACE CONVALESCENT CENTER, INC. D/B/A MADISON HEALTH & REHABILITATION CENTER; EXTENDICARE HEALTH NETWORK, INC.; EXTENDICARE HOLDINGS, INC.; EXTENDICARE HEALTH SERVICES, INC.; EXTENDICARE HEALTH FACILITY HOLDINGS, INC.; RICHMOND HEALTH FACILITIES – MADISON GP, LLC; PCPMG, LLC; THOMAS SCOTT; JOHN DOES 1 THROUGH 5, UNKNOWN DEFENDANTS — APPELLEES

OPINION
REVERSING IN PART AND REMANDING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; ACREE AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Richmond Health Facilities – Madison LP; Preferred Care of Delaware, Inc. d/b/a Preferred Care, Inc.; Preferred Care Partners Management Group, LP; Kentucky Partners Management Group, LLC; and Roy T. Baber, in his capacity as Administrator of Madison Health and Rehabilitation Center (hereafter referred to collectively as "Preferred Care") bring this appeal pursuant to Kentucky Revised Statutes (KRS) 417.220(1)(a) from a Madison Circuit Court order denying a motion to compel arbitration. At issue is whether the underlying arbitration agreement is unenforceable for lack of consideration.

According to the complaint which initiated this lawsuit, Maurice Curry was admitted as a resident of the Madison Health and Rehabilitation Center ("the facility") in Richmond, Kentucky, in 2009. He remained a resident there, except for periods when he was hospitalized, until November 14, 2012. On September 11, 2012, when Preferred Care assumed control of the facility, he entered into an Alternative Dispute Resolution Agreement ("Arbitration Agreement") pursuant to which the parties agreed to submit to arbitration any claims arising out of Curry's residence at the facility. Of particular significance for purposes of this appeal, the Agreement contained the following provision:

> The Parties agree that the speed, efficiency and cost-effectiveness of the ADR [Alternative Dispute

> Resolution] process, together with their mutual undertaking to engage in that process, constitute good and sufficient consideration for the acceptance and enforcement of this Agreement.

On April 30, 2013, Curry filed a complaint against Preferred Care and other defendants, asserting claims of negligence, medical negligence, corporate negligence, and violations of the duties owed to long-term residents under KRS 216.510, *et seq*. The complaint alleged that during his residence at the facility, Curry sustained numerous injuries, including: pressure sores; infections including osteomyelitis, MRSA and sepsis; gangrene; cellulitis; and poor hygiene.

Preferred Care filed a motion to compel arbitration in reliance on the Arbitration Agreement. The trial court ultimately entered an order (1) finding that Curry had the capacity to enter into the Arbitration Agreement; (2) denying Preferred Care's motion to compel arbitration for claims against Preferred Care prior to the execution of the Agreement; and (3) denying Preferred Care's motion to compel arbitration for issues arising after the execution of the Arbitration Agreement on the limited issue of sufficiency of consideration.

This appeal by Preferred Care followed.

An order denying a motion to compel arbitration is immediately appealable. KRS 417.220(1)(a); *Conseco Fin. Serv. Corp. v. Wilder*, 47 S.W.3d 335, 340 (Ky. App. 2001). "Before a court can order a case to arbitration, it must first find that there is a valid, binding arbitration agreement." *JPMorgan Chase Bank, N.A. v. Bluegrass Powerboats*, 424 S.W.3d 902, 907 (Ky. 2014). If the

arbitration agreement was validly formed, it is enforceable as written under both the Kentucky Uniform Arbitration Act (KUAA), KRS 417.050 *et seq.*, and the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 *et seq.*[.]" *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306, 329 (Ky. 2015), *as corrected* (Oct. 9, 2015), *reh'g denied* (Feb. 18, 2016), *cert. granted sub nom. Kindred Nursing Centers Ltd. P'ship v. Clark*, 137 S. Ct. 368, 196 L. Ed. 2d 283 (2016), and *judgment rev'd in part, vacated in part on other grounds sub nom. Kindred Nursing Centers Ltd. P'ship v. Clark*, No. 16-32, 2017 WL 2039160 (U.S. May 15, 2017). But if there is no valid arbitration agreement, then the court retains its full jurisdiction to proceed as in any other case, and the arbitration acts have no applicability. *JPMorgan Chase*, 424 S.W.3d at 907.

"[T]he existence of the agreement depends on state law rules of contract formation. An appellate court reviews the trial court's application of those rules *de novo,* although the trial court's factual findings, if any, will be disturbed only if clearly erroneous." *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581, 590 (Ky. 2012) (internal citations omitted).

Preferred Care's sole allegation of error concerns the denial of the motion to compel arbitration based on lack of consideration in the Arbitration Agreement.

Consideration is one of the fundamental elements of a valid contract. *Energy Home, Div. of S. Energy Homes, Inc. v. Peay*, 406 S.W.3d 828, 834 (Ky. 2013). Consideration is defined as

> A benefit to the party promising, or a loss or detriment to the party to whom the promise is made. "Benefit," as thus employed, means that the promisor has, in return for his promise, acquired some legal right to which he would not otherwise have been entitled. And "detriment" means that the promisee has, in return for the promise, forborne some legal right which he otherwise would have been entitled to exercise.

*Phillips v. Phillips*, 294 Ky. 323, 335, 171 S.W.2d 458, 464 (1943). Consideration has also been defined as "the reason which moves contracting parties to enter into [an] undertaking." *Cassinelli v. Stacy*, 238 Ky. 827, 38 S.W.2d 980, 983 (1931).

It is undisputed under Kentucky law that "an arbitration clause requiring both parties to submit equally to arbitration constitutes adequate consideration." *Energy Home*, 406 S.W.3d at 835 (quoting *Kruse v. AFLAC Int'l, Inc*., 458 F. Supp. 2d 375, 385 (E.D. Ky. 2006)). In accordance with this precedent, the language in the Arbitration Agreement, stating that the parties had mutually undertaken to engage in the ADR process, in and of itself constitutes sufficient consideration under Kentucky law. Curry concedes this point, but argues that the statements in the Agreement regarding the speed, efficiency and cost-effectiveness of ADR are untrue and constitute a material failure of the contract.

Although it is not binding authority, we agree with the reasoning of the federal district court for the Eastern District of Kentucky which recently addressed a similar argument. *Preferred Care of Delaware, Inc. v. Konicov*, 2016 WL 2593924 (E.D. Ky. May 4, 2016) (No. 5:15-CV-88-KKC-EBA). The appellant in that case sought to void an arbitration agreement containing a

provision identical to the one before us. She argued that the cost-effectiveness allegedly bargained for was illusory and that the contract was therefore not supported by consideration. The district court held that this argument was without merit, because it ignored the major part of the provision which did provide adequate consideration. *Id*. at *10–11. The district court also relied on *Matterhorn, Inc. v. NCR Corp.*, 763 F.2d 866, 869 (7th Cir. 1985), which states that "[i]f the agreement of one party to arbitrate disputes is fully supported by the other party's agreement to do likewise, there is no need to look elsewhere in the contract for consideration for the agreement to arbitrate[.]" *Id.*

Curry nonetheless argues that there was a failure of consideration because the statement in the Agreement regarding the speed, efficiency and cost-effectiveness of the ADR process constitutes a material misrepresentation and fraud in the inducement because, in reality, arbitration proceedings have proven to be time-consuming and expensive.

Curry relies on a Nelson Circuit Court order which found that an arbitration agreement containing similar language extolling the speed, efficiency and cost-effectiveness of ADR was void because arbitration in that case had been pending for years and had incurred high costs for the plaintiff. *Linton v. Bardstown Medical Investors, Ltd.*, No. 10-CI-00029 (Nelson Cir. Ct. July 3, 2012).[1] Curry argues that neither the defendants in the Nelson Circuit case or in

[1] The defendants brought an appeal of the order before this Court which was dismissed upon their motion on August 22, 2013. *See Bardstown Medical Investors, Ltd. v. Linton*, 2012-CA-001313-MR.

this case offered evidence to justify the claim of speed, efficiency or cost-effectiveness made in the arbitration agreements.

Because arbitration has not commenced in this case, any evidence regarding its potential speed, efficiency or cost-effectiveness would be purely speculative and anecdotal. Furthermore, the statement in the Agreement regarding the benefits of ADR directly echoes the language of the United States Supreme Court, which has stated: "In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 685, 130 S. Ct. 1758, 1775, 176 L. Ed. 2d 605 (2010). The Supreme Court has characterized "[t]he overarching purpose of the FAA, [as] evident in the text of §§ 2, 3, and 4, . . . to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344, 131 S. Ct. 1740, 1748, 179 L. Ed. 2d 742 (2011). It was not a failure of consideration for the Arbitration Agreement to echo statements made by the United States Supreme Court regarding the benefits of arbitration.

Curry also alleges that the statements constitute fraud in the inducement and material misrepresentation. He points to the deposition testimony of the facility's Admissions Coordinator, who told residents that arbitration was cheaper for the resident and the facility, that the dispute was resolved more quickly

and that the recovery was the same. He proceeds on the assumption that these statements were fraudulent and intended to mislead. Fraud must, however, be pled with specificity, pursuant to Kentucky Rules of Civil Procedure (CR) 9.02. Curry provides no citation to the record to indicate whether such pleadings exist, or whether the trial court ever ruled on this issue. The trial court's order limited its ruling to the sufficiency of the consideration supporting the Arbitration Agreement. "[E]rrors to be considered for appellate review must be precisely preserved and identified in the lower court." *Skaggs v. Assad*, 712 S.W.2d 947, 950 (Ky. 1986). Moreover, "[a]bsent an ambiguity in the contract, the parties' intentions must be discerned from the four corners of the instrument without resort to extrinsic evidence." *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 385 (Ky. App. 2002).

Furthermore, the terms of the Arbitration Agreement itself provide that it applies to "any and all disputes arising out of or in any way relating to this Agreement or to the Resident's stay at the Center that would constitute a legally cognizable cause of action in a court of law sitting in the Commonwealth of Kentucky and shall include . . . fraud; [and] misrepresentation[.]" "While obviously it is good public policy to disfavor fraud, requiring parties to arbitrate such claims (if in fact the arbitration agreement contemplates doing so, *i.e.,* the clause itself is broad enough in scope to encompass claims such as fraudulent inducement) does not in any way endorse a policy that is lax on fraud." *Louisville Peterbilt, Inc. v. Cox*, 132 S.W.3d 850, 855 (Ky. 2004).

In summary, the Arbitration Agreement in this case contains the unambiguous promise by the parties to submit equally to arbitration, which constitutes adequate consideration under Kentucky law. The language characterized by the appellees as untrue is virtually identical to that used by the United States Supreme Court to describe the benefits of ADR. The appellees have not preserved their claims of fraud and misrepresentation, or explained why these claims are not foreclosed by the terms of the Arbitration Agreement itself.

Consequently, the portion of the order of January 16, 2015, which denied Preferred Care Defendants' Motion to Compel Arbitration for issues arising after the execution of the Arbitration Agreement on the limited issue of sufficiency of consideration is hereby reversed, and the matter is remanded for further proceedings in accordance with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

Ronald G. Sheffer
Sarah E. Potter
Louisville, Kentucky

J. William Graves
Thomas L. Osborne
Paducah, Kentucky

G. Michael Stewart
Dallas, Texas

BRIEF FOR APPELLEE:

Ross F. Mann
Robert E. Salyer
Lexington, Kentucky