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Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001061-MR

DIVERSICARE LEASING CORP., D/B/A ELLIOTT NURSING & REHABILITATION CENTER; OMEGA HEALTHCARE INVESTORS, INC.; DIVERSICARE HEALTHCARE SERVICES, INC., F/K/A ADVOCAT, INC.; DIVERSICARE MANAGEMENT SERVICES COMPANY; AND BENITA ADKINS, IN HER CAPACITY AS THE ADMINISTRATOR OF ELLIOTT NURSING & REHABILITATION CENTER — APPELLANTS

v.

APPEAL FROM ELLIOTT CIRCUIT COURT
HONORABLE REBECCA K. PHILLIPS, JUDGE
ACTION NO. 11-CI-00121

WAYNE ADAMS, EXECUTOR OF THE ESTATE OF PEARL ADAMS, DECEASED — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, J. LAMBERT, AND THOMPSON, JUDGES.

J. LAMBERT, JUDGE: Diversicare Leasing Corp. d/b/a Elliott Nursing & Rehabilitation Center; Omega Healthcare Investors, Inc.; Diversicare Healthcare Services, Inc., f/k/a Advocat, Inc.; Diversicare Management Services Company; and Benita Adkins, in her capacity as Administrator of Elliott Nursing & Rehabilitation Center have taken an interlocutory appeal from the orders of the Elliott Circuit Court entered June 1 and June 3, 2015. Those orders granted in part and denied in part the motion to compel arbitration in a complaint seeking damages for injuries Pearl Adams sustained and for her wrongful death while she was a resident at the nursing home facility. After a careful examination of the record and the applicable law, we affirm the orders on appeal.

We shall begin with a description of the named parties in this action. Elliott Nursing & Rehabilitation Center is a nursing facility in Sandy Hook, Kentucky, where Adams was a resident beginning in March 2005 until her death in 2013. Diversicare Leasing Corp. is the licensee of the nursing facility and as such was legally responsible for this facility and for ensuring that it complied with all applicable laws and regulations. Omega Healthcare Investors, Inc., wholly owns Diversicare Leasing Corp., and Advocat, Inc., wholly owns Omega. Diversicare Management Services Company owns, operates, manages, controls, and provides services for nursing facilities, including the nursing home at issue in this case. Benita Adkins was the administrator of the nursing home when Adams was a

resident. We shall collectively refer to these parties as "Diversicare" in this opinion.

On December 22, 2011, Adams, through her guardian, Wayne Adams, filed a complaint against Diversicare alleging that she had suffered an accelerated deterioration of her health as a result of Diversicare's wrongful conduct, including recurring pressure ulcers, an ankle fracture, urinary tract infections, dehydration, weight loss, excoriation, blisters, skin tears, bruises, acute renal failure, upper respiratory tract infection, pneumonia, wound infections, cellulitis, and multiple respiratory failure incidents. Adams alleged causes of action for negligence, medical negligence, corporate negligence, and violations of long term care resident's rights, as well as claims of negligence against Adkins as the administrator.

In early 2012, Diversicare moved the court to enforce the arbitration agreement found in Adams' admission documents and to stay the lawsuit. Multiple admission and readmission documents had been signed by either Adams or her daughter, Linda Elam, and each admission document contained an optional arbitration clause that had not been waived. These documents are as follows:

- Admission Agreement dated March 25, 2005, signed by Elam, Adams' daughter (Admission Agreement 1). Adams was at the nursing facility under this admission agreement until mid-April 2005. The Admission Agreement contained an Agreement for Care and a Financial Agreement.

Paragraph 12 of the Agreement for Care section included an optional arbitration clause, which read as follows:

> OPTIONAL ARBITRATION CLAUSE (If the parties to this Agreement do not wish to include the following arbitration provision, please indicate so by marking an "X" through this clause. Both parties shall also initial that "X" to signify their agreement to refuse arbitration.) Any controversy or claim arising out of or relating to the Agreement, or the breach thereof, shall be settled by arbitration in accordance with the provisions of the state code and judgement [sic] upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

- Admission Agreement dated July 18, 2005, signed by Adams (Admission Agreement 2). Adams stayed in the facility this time until late August 2005. This document also contained an Agreement for Care and a Financial Agreement. The same optional arbitration agreement was included in the Agreement for Care.

- Kentucky Admission/Financial Agreement dated September 15, 2005, signed by Adams (Admission Agreement 3). Adams was in the facility until January 7, 2006, under this admission agreement. The Agreement for Care section contained an optional arbitration provision in paragraph 12, but the language differed from the previous Admission Agreements.

> OPTIONAL ARBITRATION (If either of the parties to this Admission Agreement do not wish to be bound by the Arbitration Agreement, which is being completed as an addendum to the Admission Agreement and is hereby incorporated by reference,[1] please indicate so by marking

[1] The record does not include a copy of the arbitration agreement referenced in paragraph 12. The only document attached was a list of frequently asked questions about arbitration.

> and [sic] "X" through this clause. Both parties shall also initial that "X" to signify their agreement to decline optional arbitration."
>
> The facility and the resident or the resident's authorized representative recognize that future disagreements or disputes may arise and these parties both wish to agree now, in advance, to submit any disputes that may arise between the parties involving a matter or amount in controversy which is in excess of the sum of fifteen thousand dollars ($15,000) exclusive of interest, costs, and attorneys fees, which they can not [sic] otherwise resolve to binding arbitration instead of court litigation. The parties believe binding arbitration to be a speedy and economical alternative to what is generally a more protracted, more expensive, more public and more unpredictable means of resolving disputes. The parties hereto have entered into the attached arbitration agreement, which is hereby incorporated by reference.

- Readmission/Financial Agreement dated April 11, 2006, signed by Adams (Readmission Agreement 1). She remained at the facility until April 30, 2006, for this stay. This document stated that Adams would be readmitted to the nursing facility pursuant to the terms set forth in

Admission Agreement 1, signed on March 25, 2005, by Adams' daughter.[2]

- Readmission/Financial Agreement dated November 29, 2006, signed by Adams (Readmission Agreement 2). She was discharged from this stay on April 7, 2007. This document referenced a prior Admission/Financial Agreement dated November 29, 2006, and that Adams would be readmitted under the terms of that agreement.

Diversicare argued that the circuit court should enforce the arbitration agreement pursuant to the Federal Arbitration Act, that any doubts regarding the enforceability of the arbitration agreement should be resolved in favor of enforcement, and that Kentucky courts have routinely enforced arbitration agreements between long term care facilities and residents.

Adams objected to the motion, arguing that a valid arbitration agreement did not exist as Diversicare did not attach the arbitration agreement referenced in Admission Agreement 3, dated September 15, 2005, that Elam did not have the authority to sign Admission Agreement 1, that the arbitration agreement was unconscionable under Kentucky and federal law, that the agreement lacked consideration, and that the agreement was against public policy. In reply, Diversicare argued, in part, that even if Elam did not have the authority to sign Arbitration Agreement 1, Adams signed the subsequent agreements, which replaced the one Elam signed, that the arbitration agreement was not

[2] The parties agreed that the date on Readmission Agreement 1 (March 25, 2006) was a scrivener's error, and that the year should have been written as 2005.

unconscionable, and that it was supported by valid consideration because it created mutual obligations and benefits for both parties. In addition, Diversicare explained that the arbitration agreement was contained within the admission agreement in Admission Agreement 3 and was accompanied by a document explaining the arbitration process.

The court held a hearing on the motion on August 13, 2012. Counsel for Adams indicated that he needed limited discovery to determine whether Adams was competent and whether the contracts were unconscionable. Adams filed an affidavit signed by Elam, in which she stated that she did not hold her mother's power of attorney when she signed Admission Agreement 1 on March 25, 2005, and that the document signing process was "very rushed" that day. She also was present when Adams signed documents on July 18 and September 15, 2005, and stated that the documents were not explained to her mother. "[I]t was just pointed out where she needed to sign." Arbitration was not mentioned on the latter two dates, and she stated that the signing process was again very rushed. The court permitted the parties to take limited discovery to determine whether the arbitration agreements were enforceable.

As pertains to this appeal, Benita Adkins was deposed. Adkins is the administrator of Elliott Nursing & Rehabilitation Center, and she received her license in 1998. She had been working at the facility since 1997 as an administrator-in-training. She testified generally about the admission and readmission procedures and the circumstances surrounding Adams' admissions.

Adkins testified that best practices for new admission procedures would be for the patient or a responsible party to sign the admission agreement. For a readmission, including times that the patient has been discharged to go to the hospital and readmitted after a hospital discharge or has gone home for a week for a visit, she would not expect new admission documents to be signed, but that would depend upon the circumstances. She indicated that she would "have to check" to determine the policies and procedures for when a readmission agreement was signed. She essentially testified that if patients were out of the facility for more than a few days, such as for a hospital stay, when they returned to the nursing facility, it would be a new admission. The best practice for following an extensive hospital stay would be a new admission rather than a readmission. Adkins was asked about the reference in Admission Agreement 3 to the incorporation by reference of an arbitration agreement, and she did not know what document this was referring to. As to the reference to a November 29, 2006, admission agreement in Readmission Agreement 2, Adkins stated that she assumed Adams' most recent prior admission date would have been listed. Other medical records in the record established that Adams had been admitted and discharged from the nursing facility for hospital stays several more times between March 2006 and May 2011, for which there were no admission or readmission documents completed.

After limited discovery was completed, on December 20, 2012, Diversicare filed a renewed motion to enforce the arbitration agreement and stay

the lawsuit, citing the optional arbitration agreement set forth in Admission Agreement 3 dated September 15, 2005. It argued that the evidence established that Adams was fully competent at the times the admission agreements were signed, and there was no other evidence to establish that the agreements should be invalidated. Adams objected to the motion, and argued in the alternative that any claims arising after March 26, 2006, were not subject to arbitration because Diversicare had not produced any admission agreements after 2005 that contained an arbitration provision. Adams had been discharged and readmitted to the nursing home twelve times after November 29, 2006, but no further admission or readmission documents had been produced. Adams continued to argue that the arbitration agreement was unconscionable and that Elam did not have the authority to sign Admission Agreement 1.

The court heard arguments on January 14, 2013. Diversicare asserted that the limited discovery established that Adams was competent to enter into the arbitration agreement and that the arbitration agreement should be enforced and the matter stayed pending arbitration. Adams discussed what issues were explored during limited discovery, including Adkins and other nursing facility employees. She went on to argue that Elam did not have authority to sign Admission Agreement 1 and Adams could not have ratified it by signing Readmission Agreement 1. Related to the admission agreement referenced in Readmission Agreement 2, Adkins had testified that it should have referenced the last time Adams was admitted, which was in March 2006. However, she did not sign any

admission documents that day. Adkins stated that if a patient is gone for an extensive period of more than three days, that patient must sign a new admission or readmission agreement upon returning to the facility. An agreement is only valid for the period of time a patient is in the facility, and it expires when the patient is discharged. She argued that Admission Agreement 3 had terminated and was no longer valid. Diversicare argued that the reference to the prior admission date in Readmission Agreement 2 was a scrivener's error, citing Adkins' testimony that she believed it was meant to apply to the previous admission agreement, dated September 15, 2005. After November 29, 2006, Adams argued that there were multiple other admissions/readmissions when she went to the hospital. Even if a contract was invalid, the nursing facility was still under an implied-in-fact contract because it was receiving Medicaid funds, but there was no paperwork to satisfy the Federal Arbitration Act. The court took the matter under submission.

On April 12, 2013, a notice was filed that Adams had passed away on March 25, 2013. Several months later, Wayne Adams, as Adams' guardian, filed an application to revive the action pursuant to Kentucky Revised Statutes (KRS) 395.278 and to amend the complaint to substitute himself as the plaintiff and to add a cause of action for wrongful death. He had been appointed as the executor of his mother's estate on July 11, 2013. In response, Diversicare stated that the matter was in abeyance pursuant to KRS 417.060 and that a ruling on the motion to enforce the arbitration agreement was necessary before the circuit court could rule on any substantive motions. The court granted the motion to substitute and to file

an amended complaint pursuant to a calendar order entered December 9, 2013, holding that the wrongful death claim would not be subject to arbitration. On December 18, 2013, the Diversicare parties filed separate answers to Adams' amended complaint.[3]

On June 1, 2015, the court entered an order partially granting and partially denying Diversicare's motion to compel arbitration. Two days later, the court entered an opinion setting forth a summary of the relevant facts and its legal conclusions. The court determined that by signing Readmission Agreement 1, Adams ratified her daughter's execution of Admission Agreement 1, and Readmission Agreement 1 stayed in effect until Readmission Agreement 2 was signed. However, the court found that in relation to the language in Readmission Agreement 2, there was no admission agreement dated November 29, 2006, and it was "mere speculation" that this readmission agreement meant to incorporate Admission Agreement 3. Because the readmission agreements did not contain any arbitration clauses, the court found that "the claims arising after November 29, 2006, are not encompassed within a binding arbitration clause" and were therefore not subject to arbitration. The parties agreed that the wrongful death claim was not subject to the arbitration clause. Finally, the court indicated that it could not determine whether the claims at issue in the case arose during a time period subject

[3] The amended complaint is not included in the certified record on appeal.

to an enforceable arbitration agreement and permitted the parties to seek clarification by motion if necessary. This interlocutory appeal now follows.[4]

On appeal, Diversicare argues that Readmission Agreement 2 should have been reformed to reflect the intent of the parties to incorporate an earlier admission agreement and that if Readmission Agreement 2 was not an enforceable agreement, it could not replace a previous agreement. Adams contends that the circuit court's rulings should be affirmed.

Kentucky's Uniform Arbitration Act is set forth in KRS Chapter 417. KRS 417.050 provides as follows: "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 417.060(1), in turn, provides:

> On application of a party showing an agreement described in KRS 417.050, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration. If the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised. The court shall order arbitration if found for the moving party; otherwise, the application shall be denied.

As Diversicare points out, "[t]he party seeking to avoid the arbitration agreement has a heavy burden." *Louisville Peterbilt, Inc. v. Cox*, 132 S.W.3d 850, 857 (Ky. 2004), citing *Valley Constr. Co., Inc., v. Perry Host Mgmt. Co., Inc.*, 796 S.W.2d

[4] KRS 417.220(1)(a) permits a party to take an appeal from "[a]n order denying an application to compel arbitration made under KRS 417.060[.]"

365, 368 (Ky. App. 1990). However, we also agree with Adams that "the party seeking to enforce an agreement has the burden of establishing its existence," and that only "once prima facie evidence of the agreement has been presented, the burden shifts to the party seeking to avoid the agreement." *Id*. Accordingly, Diversicare must establish that an arbitration agreement exists before it may be enforced. Furthermore, "an arbitration agreement must be in writing: '[T]here is no question that agreements to arbitrate, to be binding under the federal and state arbitration acts, must be in writing.'" *Dixon v. Daymar Colleges Grp., LLC*, 483 S.W.3d 332, 343 (Ky. 2015), quoting *JP Morgan Chase Bank, N.A. v. Bluegrass Powerboats*, 424 S.W.3d 902, 910 (Ky. 2014).

Our standard of review "of a trial court's ruling in a KRS 417.060 proceeding is according to usual appellate standards. That is, we defer to the trial court's factual findings, upsetting them only if clearly erroneous or if unsupported by substantial evidence, but we review without deference the trial court's identification and application of legal principles." *Conseco Fin. Servicing Corp. v. Wilder*, 47 S.W.3d 335, 340 (Ky. App. 2001).

For its first argument, Diversicare contends that Readmission Agreement 2 should be reformed to incorporate by reference a prior admission agreement that contained an arbitration agreement. As set forth above, Readmission Agreement 2, dated November 29, 2006, recites that Adams would be readmitted to the facility pursuant to an admission/financial agreement dated the same day. However, a separate admission/financial agreement dated November

29, 2006, does not exist, and Readmission Agreement 2 did not otherwise include an arbitration agreement. Diversicare argues that because the parties intended to reference one of the three earlier admission agreements rather than one dated November 29, 2006, the readmission agreement should be reformed to correct the scrivener's error.

In *Cadleway Properties, Inc. v. Bayview Loan Servicing, LLC*, 338 S.W.3d 280, 287 (Ky. App. 2010), this Court addressed the remedy of reformation:

> *American Jurisprudence* addresses the mistake of a scrivener or draftsman as follows:
>
> > The remedy of reformation is appropriate where, by reason of an unintentional mistake by a scrivener or draftsman, the written agreement does not accurately reflect the intent of the parties. However, before the reformation of a written contract is warranted, it must be shown that the scrivener's product reflects something other than what was understood by both parties. Under the "doctrine of scrivener's error," the mistake of a scrivener in drafting a document may be reformed based upon parol evidence, provided the evidence is clear, precise, convincing and of most satisfactory character that the mistake has occurred and that the mistake does not reflect the intent of the parties.
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> 66 Am.Jur.2d *Reformation of Instruments* § 19 (citations omitted).

In *Abney v. Nationwide Mut. Ins. Co.*, 215 S.W.3d 699, 704 (Ky. 2006), as modified on denial of reh'g (Mar. 22, 2007), the Supreme Court of Kentucky set forth the elements a party must prove in order to reform a document:

> To vary the terms of a writing on the ground of mistake, the proof must establish three elements. *See Campbellsville Lumber Co. v. Winfrey*, 303 S.W.2d 284, 286 (Ky. 1957). First, it must show that the mistake was mutual, not unilateral. *See id*. Second, "[t]he mutual mistake must be proven beyond a reasonable controversy by *clear and convincing evidence*." *Id*. (emphasis in original). Third, "it must be shown that the parties had actually agreed upon terms different from those expressed in the written instrument." *Id*.
>
> The mistake must be one as to a material fact affecting the agreement and not one of law, which is "an erroneous conclusion respecting the legal effect of known facts." *Sadler v. Carpenter*, 251 S.W.2d 840, 842 (Ky. 1952). A material fact is one that goes to the root of the matter or the whole substance of the agreement. *See Sherwood v. Walker*, 66 Mich. 568, 33 N.W. 919, 923 (Mich. 1887) (holding that there was a jury issue on mutual mistake of material fact when contract was for the sale of a "barren cow" and the cow was pregnant at the time of the sale).
>
> (footnote omitted)

Having considered the parties' arguments, we must hold that the circuit court properly declined Diversicare's request to reform Readmission Agreement 2 to incorporate an earlier admission agreement that contained an arbitration clause. It is purely speculative as to which document was meant to be incorporated into Readmission Agreement 2, be it one of the earlier admission agreements or an admission agreement dated November 29, 2006, which was never produced. Because Diversicare was unable to establish with any certainty which document was intended to be incorporated by reference in Readmission Agreement 2 and because the admission agreement did not otherwise contain an arbitration

clause, we must hold that the circuit court did not err as a matter of law in declining to enforce an arbitration agreement purportedly referenced in an unspecified document.

In the alternative, Diversicare argues that if Readmission Agreement 2 was not an enforceable agreement, it could not supplant Readmission Agreement 1, which did reference an earlier enforceable admission agreement containing an arbitration agreement and which would have remained in effect. Adams contends that Diversicare did not preserve this argument by raising the issue below. Diversicare, in response, states that this was not a new theory and that it was included in its proposed findings of fact and conclusions of law. While this proposed document was not included as an exhibit to the reply brief or was otherwise included in the record on appeal, we shall nevertheless accept Diversicare's statement and briefly review this issue.

We note that the circuit court did not reach any conclusion as to whether Readmission Agreement 2 bound the parties to any contractual terms, outside of whether an enforceable arbitration agreement existed, or whether the parties had been operating under an implied contract after November 29, 2006. The court merely held that there was not an arbitration agreement in writing that could be enforced from and after that date. We find no error in this conclusion, and we reject Diversicare's argument that Readmission Agreement 1 remained in effect.

For the foregoing reasons, the order and opinion of the Elliott Circuit Court denying in part and granting in part Diversicare's motion to compel arbitration is affirmed.

ALL CONCUR.

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