

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001982-MR

LP BEATTYVILLE, LLC,
D/B/A LEE COUNTY CARE &
REHABILITATION CENTER;
LP CR HOLDINGS, LLC;
SIGNATURE HEALTHCARE CLINICAL
CONSULTING SERVICES, LLC;
SIGNATURE HEALTHCARE
CONSULTING SERVICES, LLC;
SIGNATURE HEALTHCARE, LLC; AND
SUSAN BUSH, IN HER CAPACITY AS
ADMINISTRATOR OF LEE COUNTY
CARE & REHABILITATION CENTER

APPELLANTS

v. APPEAL FROM LEE CIRCUIT COURT
HONORABLE MICHAEL DEAN, JUDGE
ACTION NO. 15-CI-00096

JIMMY BROWN, AS ADMINISTRATOR
OF THE ESTATE OF DALE ROGER BROWN,
DECEASED

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, STUMBO AND THOMPSON, JUDGES.

THOMPSON, JUDGE: LP Beattyville, LLC d/b/a Lee County Care & Rehabilitation Center, LP CR Holdings, LLC, Signature Healthcare Clinical Consulting Services, LLC, Signature HealthCARE, LLC and Susan Bush, in her capacity as Administrator of Lee County Care & Rehabilitation Center (collectively Lee County Rehabilitation) appeal from an order of the Lee Circuit Court denying a motion to compel alternative dispute resolution, or in the alternative, stay the pending lawsuit. Lee County Rehabilitation argues that Jimmy Brown had the actual or apparent authority to sign a dispute resolution agreement containing an arbitration clause on behalf of his brother, Dale Brown or, alternatively, that it should have been permitted to conduct discovery on the issue.

Dale Brown, a prior resident of Lee County Rehabilitation, was re-admitted to Lee County Rehabilitation on March 4, 2009. Upon Dale's readmission to the facility, Jimmy was presented with an admissions packet containing several documents, one of which was a dispute resolution agreement. Pursuant to that agreement, any dispute arising out of or in any way related to Dale's care at the facility was to be submitted to mediation and, if the parties were unable to resolve the dispute, to binding arbitration. Above the signature line, the form agreement stated:

The person signing below certifies that he/she has the legal authority to enter into this Agreement on Resident's behalf with the Facility through: (1) a valid Power of Attorney; (2) guardianship/conservator, appointment; or

(3) as the healthcare surrogate or proxy for the Resident in accordance with applicable state law.

A signature line for the “legal representative” followed. Jimmy signed the agreement without indicating his type of legal authority as requested in the agreement.

Following Dale’s death, Jimmy, as administrator of Dale’s estate and on behalf of the wrongful death beneficiaries of Dale, filed this action against Lee County Rehabilitation alleging: negligence, medical negligence, violations of the Long Term Care Facilities Act, Kentucky Revised Statutes (KRS) 216.510 *et seq.*, fraud, breach of fiduciary duty, and wrongful death. Lee County Rehabilitation answered and subsequently filed a motion to dismiss or compel the parties to binding arbitration. The circuit court denied that motion and this appeal followed.

Although an order denying arbitration is interlocutory, “an ordinary appeal at the close of litigation will not often provide an adequate remedy for the wrongful denial of a right to arbitrate[.]” *Conseco Fin. Servicing Corp. v. Wilder*, 47 S.W.3d 335, 340 (Ky.App. 2001). Consequently, KRS 417.220(1)(a) provides that an appeal may be taken from “[a]n order denying an application to compel arbitration made under KRS 417.060[.]”

Initially, we note that neither Dale nor Jimmy, acting on his behalf, could bind the wrongful death beneficiaries to a dispute resolution agreement. “Because under our laws, the wrongful death claim is not derived through or on behalf of the [decedent], but accrues separately to the wrongful death beneficiaries and is meant

to compensate them for their own pecuniary loss, ... a decedent cannot bind his or her beneficiaries to arbitrate their wrongful death claim.” *Ping v. Beverly Enterprises, Inc.*, 376 S.W.3d 581, 599 (Ky. 2012). However, the remaining claims, to the extent that they survived Dale, may be subject to arbitration if Jimmy had authority to execute the dispute resolution agreement on Dale’s behalf.

KRS 417.050 provides: “A written agreement to submit any existing controversy to arbitration between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law for the revocation of any contract.” The existence of a valid arbitration agreement is a threshold matter to be resolved by the court based on state law. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 1924, 131 L.Ed.2d 985 (1995). “In other words, the court--not an arbitrator--must decide whether the parties have agreed to arbitrate based on fundamental principles governing contract law.” *Mortgage Electronic Registration Systems, Inc. v. Abner*, 260 S.W.3d 351, 353 (Ky.App. 2008).

Under Federal and State Arbitration Acts, “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *Louisville Peterbilt, Inc. v. Cox*, 132 S.W.3d 850, 855 (Ky. 2004) (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983)). However, before such public policy considerations are relevant, there must first be

a binding arbitration agreement. If there is no agreement, there is no language to construe and the issue of any defense against arbitration is mooted.

An elementary principle of contract law is that “[t]o create a valid, enforceable contract, there must be a voluntary, complete assent by the parties having capacity to contract.” *Connors v. Eble*, 269 S.W.2d 716, 717-18 (Ky. 1954). Because Dale was not a party to the dispute resolution agreement, his estate is bound by that agreement only if Lee County Rehabilitation can establish that Jimmy had authority to enter into it on Dale’s behalf.

An agency “is the fiduciary relation which results from the manifestation of consent by one person [the principal] to another [the agent] that the other shall act on his behalf and subject to his control, and consent by the other so to act.” *Ping*, 376 S.W.3d at 591 (quoting *Phelps v. Louisville Water Company*, 103 S.W.3d 46, 50 (Ky. 2003)(brackets in original). An agent’s authority can be actual or apparent. “An agent has actual authority to take action designated or implied in the principal’s manifestations to the agent and acts necessary and incidental to achieving the principal’s objectives, as the agent reasonably understands the principal’s manifestations and objectives when the agent determines how to act.” *Id.* at 592 (quoting *Restatement (Third) of Agency* § 2.02 (2006)). A purported agent’s apparent authority exists “when the principal has manifested to the third party that the agent is so authorized, and the third party reasonably relies on that manifestation. The principal will then be bound by such a transaction even if the agent was not actually authorized to enter it.” *Id.* at 594.

Despite Lee County Rehabilitation's assertion that Jimmy had actual authority to waive Dale's right to a jury trial and enter into the dispute resolution agreement, it has not produced any written document which conferred that authority upon Jimmy. The only evidence in the record is to the contrary. Jimmy submitted an affidavit stating that he was never Dale's attorney-in-fact and had never been appointed as Dale's legal guardian. The only power-of-attorney document executed by Dale appointed his son, Joshua, as his attorney-in-fact. There is no evidence that Jimmy had actual authority to enter into the arbitration agreement.

Lee County Rehabilitation's argument that Jimmy had apparent authority to execute the arbitration agreement on Dale's behalf based on his signature as Dale's "legal representative" is equally unconvincing. Even if Jimmy believed that he had authority to execute a dispute resolution agreement when signing the admission papers, his belief or Lee County's Rehabilitation's belief is inconsequential. Whether apparent authority exists depends on manifestations of authority by the principal, not the agent. *Id.*

Lee County Rehabilitation argues Dale made those manifestations through three forms signed while a resident of its facility. One is a consent for use of side rails which Dale signed and Jimmy signed as "resident representative or durable power of attorney for healthcare signature/relationship." The other two forms were Resource Assessment Certifications for the Department of Medicaid Services completed by Denise Lynch, the Director of Consumer Relations for Lee County

Rehabilitation. On both forms, Jimmy is listed as the “responsible party/legal representative;” however, neither form in any way suggests that Jimmy had authority to enter into a dispute resolution agreement. Most importantly, these forms were executed in 2011 and 2012 and are irrelevant to Jimmy’s authority to execute the dispute resolution agreement on March 4, 2009.

After filing its motion to compel alternative dispute resolution, or in the alternative to stay the pending lawsuit, Lee County Rehabilitation requested additional time to conduct discovery on the issue of whether Jimmy had actual or apparent authority to enter into the dispute resolution agreement. The trial court ruled on the motion without additional discovery taken. Lee County Rehabilitation argues the trial court erred.

“It is a well-established principle that a trial court has broad discretion over disputes involving the discovery process.” *Sexton v. Bates*, 41 S.W.3d 452, 455 (Ky.App. 2001). A trial court’s decision on denying additional time for discovery will be reversed only if that discretion is abused meaning that it was “arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

The burden was upon Lee County Rehabilitation to establish the existence of a valid arbitration agreement, including Jimmy’s authority to execute such an agreement on Dale’s behalf. *Ping*, 376 S.W.3d at 590. It is disingenuous for Lee County Rehabilitation to file a motion to compel arbitration and then argue it requires additional time to conduct discovery to meet its burden to establish a valid

arbitration agreement exists. We conclude the trial court did not abuse its discretion.

Based on the foregoing, the order of the Lee Circuit Court is affirmed.

STUMBO, JUDGE, CONCURS.

COMBS, JUDGE, CONCURS IN RESULT ONLY.

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