

RENDERED: MAY 24, 2019; 10:00 A.M.  
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

## Court of Appeals

NO. 2018-CA-000178-MR

LEXINGTON ALZHEIMER'S INVESTORS, LLC, D/B/A THE LANTERN AT  
MORNING POINTE ALZHEIMER'S CENTER OF EXCELLENCE;  
INDEPENDENT HEALTHCARE PROPERTIES, LLC;  
GREG A. VITAL; FRANKLIN FARROW; AND HEATHER  
LARRABEE, ELIZABETH CHAPPELL, AND BRIAN HENRIOTT,  
IN THEIR CAPACITIES AS ADMINISTRATORS OF THE  
LANTERN AT MORNING POINTE ALZHEIMER'S CENTER  
OF EXCELLENCE

APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE KIMBERLY N. BUNNELL, JUDGE  
ACTION NO. 17-CI-02377

DENNIS A. BRADLEY, PUBLIC ADMINISTRATOR  
OF THE ESTATE OF KATHERINE FISCHER, DECEASED

APPELLEE

OPINION  
AFFIRMING

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BEFORE: TAYLOR, K. THOMPSON, AND L. THOMPSON, JUDGES.

L. THOMPSON, JUDGE: Lexington Alzheimer's Investors, LLC, d/b/a The  
Lantern at Morning Point Alzheimer's Center of Excellence; Independent

Healthcare Properties, LLC; Greg A. Vital; Franklin Farrow; and Heather Larrabee, Elizabeth Chappell and Brian Henriott, in their capacities as administrators of The Lantern at Morning Pointe Alzheimer’s Center of Excellence (hereinafter Appellants) appeal from a ruling of the Fayette Circuit Court styled Findings of Fact, Conclusions of Law, and Order Denying Defendants’ Motion to Compel Arbitration and to Dismiss or Stay the Pending Lawsuit. Appellants argue that the arbitration agreements entered into by the parties are valid and binding under the Federal Arbitration Act (“FAA”) and Kentucky law, and that the Fayette Circuit Court erred in failing to so rule. They also contend that the National Arbitration Forum (“NAF”) Code of Procedure does not allow the Appellee<sup>1</sup> to reject arbitration and pursue claims through the filing of a civil complaint. For the reasons addressed below, we find no error and AFFIRM the order on appeal.

On July 12, 2016, Katherine Fischer was admitted as a resident of Lexington Alzheimer’s Investors LLC, d/b/a The Lantern at Morning Pointe Alzheimer’s Center of Excellence (hereinafter “Morning Pointe”), an assisted

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<sup>1</sup> The notice of appeal designates the Appellee as Katherine Fischer, by and through her co-guardians, Katherine S. Brown and Susan Varela. A notice of death was entered into the record on March 27, 2018, stating that Ms. Fischer died on or about February 26, 2018. On June 8, 2018, the Fayette Circuit Court entered an order substituting as Plaintiff “Katherine Brown, as Executrix of the Estate of Katherine Fischer.” Because the Fayette Circuit Court and Court of Appeals had concurrent jurisdiction during this period, and as the Plaintiff’s name was changed after the filing of the notice of appeal, the Appellee’s name appears in various configurations in the appellate record. On May 3, 2019 an order was entered in this Court substituting Dennis Bradley as Public Administrator for the Estate of Katherine Fischer.

living facility. During the admissions process, Ms. Fischer's co-guardians, Susan Varela and Katherine Brown, executed an arbitration agreement with Morning Pointe.

On July 5, 2017, Brown and Varela, as co-guardians, filed a Complaint against the Appellants in Fayette Circuit alleging the negligent treatment and care of Ms. Fischer. Discovery followed, whereupon Appellants filed a joint motion to dismiss or stay plaintiff's claims on behalf of Katherine Fischer pending alternative dispute resolution. As a basis for the motion, the Appellants argued that the arbitration agreement should be given effect in lieu of ongoing litigation. After the parties briefed the matter and presented oral arguments, the Fayette Circuit Court rendered its order denying defendants' motion to compel arbitration. The trial court found that the NAF Code, which was incorporated into the arbitration agreement, provided that only the NAF would be allowed to administer the NAF Code of Procedure and that the Code allows the parties to seek "legal and other remedies" if the NAF is unable to arbitrate a dispute. The court found that the arbitration agreement was enforceable, that the NAF Code was part of the agreement, that NAF was unavailable to conduct the arbitration and that the Code allowed Appellee to then bring this action in a court of law. This appeal followed.

In reviewing an order denying enforcement of an arbitration agreement, the trial court's legal conclusions

are reviewed *de novo* “to determine if the law was properly applied to the facts[;]” however, factual findings of the trial court “are reviewed under the clearly erroneous standard and are deemed conclusive if they are supported by substantial evidence.”

*Energy Home, Div. of S. Energy Homes, Inc. v. Peay*, 406 S.W.3d 828, 833 (Ky. 2013) (citation omitted).

Appellants argue that the agreement did not require the NAF to participate in the arbitration; therefore, the FAA requires that the trial court appoint a different arbitrator. We disagree. What must be remembered is that arbitration agreements are contracts and we are required to enforce contracts according to their terms. *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 67, 130 S.Ct. 2772, 2776, 177 L.Ed.2d 403 (2010). “[C]ourts cannot make a new contract for the parties under the guise of interpretation or construction but must determine the rights of the parties according to the terms agreed upon by them.” *Ritchie v. Turner*, 547 S.W.3d 145, 148 (Ky. App. 2018) (quotation marks and citation omitted).

Appellants are correct that the FAA does allow courts to substitute arbitrators if necessary, 9 U.S.C.<sup>2</sup> § 5; however, we find that the terms of the agreement required the NAF to be the arbitrator and if it could not, then it allowed Appellee to pursue other legal remedies. As stated previously, the agreement

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<sup>2</sup> United States Code.

incorporated the NAF Code into its terms and the Code provided that only the NAF would be allowed to administer the NAF Code of Procedure. Further, the Code allows the parties to seek “legal and other remedies” if the NAF is unable to arbitrate a dispute. Based on the clear terms of the contract, we agree with the trial court that Appellee was able to bring this cause of action in a court of law because the NAF was unable to arbitrate this case.

Appellants also argue that 9 U.S.C.A § 5 required the trial court to appoint a new arbitrator regardless of the terms of the NAF Code. They cite to case law from courts across the country regarding whether the named arbitrator is an integral part of the agreement rather than an ancillary logistical concern. *See Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217 (11th Cir. 2000); *Miller v. GGNSC Atlanta, LLC*, 746 S.E.2d 680 (Ga. App. 2013); *Stewart v. GGNSC-Canonsburg, L.P.*, 9 A.3d 215, 218-20 (Pa. Super. Ct. 2010). This is an issue of first impression in Kentucky.

Pursuant to 9 U.S.C.A § 5, the substitution of an arbitrator is only permitted if the named arbitrator is not an integral part of the arbitration agreement. “Only if the choice of forum is an integral part of the agreement to arbitrate, rather than an ‘ancillary logistical concern’ will the failure of the chosen forum preclude arbitration.” *Brown*, 211 F.3d at 1222. We find that the NAF in this case was an integral part of the arbitration agreement. It is clear from the

terms of the agreement that the parties intended to arbitrate exclusively before the NAF. The NAF Code was incorporated into the agreement and pursuant to the terms of the Code, only the NAF could utilize it. Furthermore, at the bottom of the first page of the agreement is information regarding the NAF, its arbitration services, and the fees for said services. It is unlikely that this information regarding fees and services would have been included in the agreement if the parties intended to utilize other arbitrators.

Finally, while Appellants argue that this was a general agreement to arbitrate and that any arbitrator could be used, we find it unlikely that that was the intention when the parties entered into the agreement. If the roles were reversed and Appellee had sought a different arbitrator, assuming the NAF was available, it is doubtful that Appellants would be willing to substitute a different arbitrator. The more likely scenario would be that they would demand that Appellee be held to the clear terms of the agreement.

The terms of the agreement are clear that the NAF was the sole arbitrator available in this case. Absent participation of the NAF, Appellee was free to bring the underlying claims in the circuit court; therefore, we affirm the judgment of the trial court.

ALL CONCUR.

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