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Court of Appeals of Mississippi.

COVENANT HEALTH & REHABILITATION OF PICAYUNE, LP and Covenant Dove, Inc., Appellants

v.

Nellie LUMPKIN, by and through Fred Lumpkin, Next Friend, Appellee.

No. 2007-CA-00449-COA.

Feb. 5, 2008.

Before KING, C.J., BARNES and ISHEE, JJ.

ISHEE, J., for the Court.

\*1 ¶ 1. Nellie Lumpkin, through her husband and next friend Fred Lumpkin, filed suit against Covenant Health and Rehabilitation of Picayune (Covenant Health) seeking damages for personal injuries that allegedly occurred during her stay at its facility. Covenant Health subsequently moved to compel arbitration of the case based on the arbitration clause found in its standard admissions agreement. The trial court refused to compel arbitration, finding the admissions agreement substantively unconscionable and void as a matter of law. Aggrieved, Covenant Health appeals, seeking enforcement of the arbitration provision. Lumpkin asks us to affirm the decision of the trial court, and find that either (1) no arbitration agreement was ever created, because Lumpkin's daughter lacked capacity to bind Lumpkin to arbitration or, in the alternative, that the arbitration clause fails for lack of consideration; or (2) the arbitration clause is void due to fraud in the inducement and substantive unconscionability.

¶ 2. Finding that Lumpkin's daughter possessed the capacity to bind her mother to arbitration, that there existed sufficient consideration to support the creation of the arbitration clause, that Lumpkin's daughter was not fraudulently induced into signing the admissions agreement, and that the admissions agreement and the arbitration clause are substantively conscionable, we reverse the judgment of the trial court and remand this case for further proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

¶ 3. On April 11, 2003, Lumpkin was admitted to the Picayune Convalescent Center (owned and operated by Covenant Health). She was accompanied by her daughter, Beverly McDaniel. Due to several illnesses, including Parkinson's disease, psychosis, and dementia, that prevented Lumpkin from fully participating in the admissions process, McDaniel filled out all the admissions paperwork and signed the admissions agreement. That agreement contained, among other things, an arbitration clause requiring both parties to submit to arbitration in the event any dispute arose between them.

¶ 4. Lumpkin left the Picayune Convalescent Center on December 23, 2004. In November 2006, she filed suit against Covenant Health, alleging negligent treatment and malpractice during her stay at the center. On December 11, 2006, Covenant Health filed its motion to compel arbitration, based on the arbitration clause contained in the admissions agreement used at the time Lumpkin was admitted to the Picayune Center. In March 2007, the trial court denied Covenant Health's motion to compel arbitration, and it is from this ruling that Covenant Health now appeals.

DISCUSSION AND ANALYSIS

[1] Headnote Citing References[2] Headnote Citing References ¶ 5. This Court reviews orders denying motions to compel arbitration de novo. Vicksburg Partners, L.P. v. Stephens, 911 So.2d 507, 513(¶ 9) (Miss.2005). Although not directly raised by either party in this case, as a threshold issue this Court must determine whether the Federal Arbitration Act (FAA) controls the arbitration agreement presented here. Our supreme court has previously held that “singular agreements between care facilities and care patients, when taken in the aggregate, affect interstate commerce.” Id. at 515(¶ 16). In this case, as in Vicksburg Partners, “since the arbitration clause is a part of a contract (the nursing home admissions agreement) evidencing in the aggregate economic activity affecting interstate commerce, the Federal Arbitration Act is applicable....” Id. at 515-16(¶ 18).

\*2 ¶ 6. Having made the determination that the arbitration agreement in this case is governed by the FAA, we must next determine if that arbitration agreement is valid. Again we are guided by the supreme court, which has stated that “[i]n determining the validity of a motion to compel arbitration under the Federal Arbitration Act, courts generally conduct a two-pronged inquiry. The first prong has two considerations: (1) whether there is a valid arbitration agreement and (2) whether the parties' dispute is within the scope of the arbitration agreement.” East Ford, Inc. v. Taylor, 826 So.2d 709, 713(¶ 9) (Miss.2002). The second prong involves an inquiry into “whether legal constraints external to the parties' agreement foreclosed arbitration of those claims.” Id. at 713(¶ 10) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985)).

[3] Headnote Citing References ¶ 7. With respect to the first prong of the analysis outlined above, “[t]o determine whether the parties agreed to arbitration, we simply apply contract law.” Terminix Int'l, Inc. v. Rice, 904 So.2d 1051, 1055(¶ 9) (Miss.2004). Regarding this prong of our inquiry, Lumpkin asserts that her daughter, McDaniel, lacked the capacity to consent to arbitration as her health-care surrogate and, in the alternative, that the arbitration clause is void because it lacked sufficient consideration. We address each of these issues below.

1. Beverly McDaniel possessed the capacity to bind her mother to arbitration.

¶ 8. Lumpkin asserts that her daughter, Beverly McDaniel, did not have the capacity to bind her to arbitration while acting as her health-care surrogate under the Uniform Health-Care Decisions Act. Miss.Code Ann. §§ 41-41-201 to 41-41-229 (Supp.2006). Lumpkin does not dispute that McDaniel was, in fact, acting as her health-care surrogate for the purposes of that section when she was admitted to the Picayune Convalescent Center.

¶ 9. Our supreme court recently addressed this very issue in Covenant Health Rehab of Picayune, L.P. v. Brown, 949 So.2d 732 (Miss.2007). In Brown, the plaintiffs, as administrators of the estate of their deceased mother, filed a wrongful death suit against the nursing home in which their mother resided prior to death. Id. at 735(¶ 1). An adult daughter of the deceased signed the admissions agreement as the “responsible party” for her mother upon admission to the facility. Id. The defendants filed a motion to compel arbitration based on the admissions agreement, and the trial court denied that motion. On appeal, the supreme court held that the adult daughter of the patient, acting as a health-care surrogate, had the authority to contractually bind her mother in health-care matters under our Uniform Health-Care Decisions Act. Id. at (¶ 3).

[4] Headnote Citing References ¶ 10. In reversing the trial court's denial of the motion to compel arbitration in Brown, the supreme court implicitly held that the surrogate's authority to bind the patient extended to the arbitration clause in the admissions agreement. In this case, because Lumpkin does not dispute that her daughter was acting as her health-care surrogate for the purposes of the Uniform Health-Care Decisions Act, we see no reason to depart from the supreme court's holding in Brown. Therefore, we find that a health-care surrogate, acting under the provisions of the Uniform Health-Care Decisions Act, is capable of binding his or her patient to arbitration. Accordingly, we find that Lumpkin's argument on this issue is without merit.

2. The arbitration clause does not fail for lack of consideration.

\*3 ¶ 11. Lumpkin also asserts that the arbitration clause should fail for lack of consideration. She relies solely on the affidavit of Keri Ladner, the facility administrator for Covenant Health, in making this argument. Lumpkin points to Ladner's statement that Lumpkin would not have been refused admission to the facility had she objected to the arbitration agreement as evidence that the arbitration clause lacked consideration, and that therefore the arbitration clause should be stricken from the admissions agreement.

[5] Headnote Citing References[6] Headnote Citing References ¶ 12. We first note that Ladner's statements are irrelevant to the issue of consideration. The only thing her statements represent is an admission that, in retrospect, Lumpkin's daughter could have entered into a more beneficial contract for her mother had she bargained for it. Simply because one party to a contract later admits that the other party could have successfully bargained for more beneficial terms at the time the contract was formed does not mean that the element of the contract not bargained for is void for lack of consideration. In any contract, “[a]ll that is needed to constitute a valid consideration to support an agreement or contract is that there must be either a benefit to the promissor or a detriment to the promisee. If either of these requirements exist, there is a sufficient consideration.” Theobald v. Nosser, 752 So.2d 1036, 1040(¶ 15) (Miss.1999).

[7] Headnote Citing References[8] Headnote Citing References ¶ 13. Second, even if Ladner's statements were relevant to this issue, this Court would be prevented from considering them by the parol evidence rule. It is a well-settled principle of contract law that “a written contract cannot be varied by prior oral agreements. Moreover, as an evidentiary matter, parol evidence to vary the terms of a written contract is inadmissible.” Carter v. Citigroup, Inc., 938 So.2d 809, 818(¶ 41) (Miss.2006) (quoting Stephens v. Equitable Life Assurance Soc'y of the United States, 850 So.2d 78, 83(¶ 14) (Miss.2003)). Although parol evidence is sometimes admissible when there has been, among other things, a showing that a contract contains ambiguous language, here there has been no such showing. Neither party has even suggested that there is any ambiguity in the agreement.

¶ 14. Without such a showing, we must look to the agreement of the parties in order to determine whether there was sufficient consideration. Again, in any contract, “[a]ll that is needed to constitute a valid consideration to support an agreement or contract is that there must be either a benefit to the promissor or a detriment to the promisee. If either of these requirements exist, there is a sufficient consideration.” Theobald, 752 So.2d at 1040(¶ 15).

[9] Headnote Citing References ¶ 15. Here, there is quite clearly sufficient consideration to support the arbitration agreement. Both parties undertook duties towards one another under the admissions agreement. Covenant Health promised to provide care and assistance to Lumpkin. Lumpkin promised to pay it for its service. The arbitration clause was one portion of that exchange, and it obligated both parties to arbitrate any dispute between them. The mutuality of exchange found throughout the admissions agreement provides ample evidence that there was sufficient consideration to support the arbitration clause; therefore, we find that the arbitration clause does not fail for lack of consideration.

3. The dispute is within the scope of the arbitration clause.

\*4 [10] Headnote Citing References[11] Headnote Citing References ¶ 16. Although not directly addressed by either party in this appeal, under our standard of review in this case, this Court must determine that the dispute between the parties falls within the scope of the arbitration agreement in order to compel arbitration. To do so, we look to the language of the arbitration clause itself. In this case, that language is very clear. The arbitration clause states that “[t]he Resident and Responsible Party agree that any and all claims, disputes, and/or controversies between them and the Facility or its Owners, officers, directors, or employees shall be resolved by binding arbitration....” Clearly, the arbitration clause was meant to apply to any dispute, regardless of its nature, that arose between the facility and Lumpkin, including her current claims of negligence and malpractice. Consequently, we find that the dispute between Lumpkin and Covenant Health falls within the scope of the arbitration clause.

4. The arbitration clause does not violate any external legal constraints.

¶ 17. Having determined that a valid arbitration agreement exists, and that the current dispute falls within the scope of that agreement, we now turn to the second prong of the test set out in East Ford, which involves an inquiry into “whether legal constraints external to the parties' agreement foreclose arbitration of those claims.” East Ford, 826 So.2d at 713(¶ 10) (quoting Mitsubishi Motors Corp., 473 U.S. at 626, 105 S.Ct. 3346). The supreme court has stated that, under the second prong of the East Ford test, “applicable contract defenses available under state contract law such as fraud, duress, and unconscionability may be asserted to invalidate the arbitration agreement without offending the Federal Arbitration Act.” Id.

¶ 18. Lumpkin specifically asserts two of the defenses listed above, fraud and substantive unconscionability, in her argument to sustain the ruling of the trial court and void the arbitration clause.

A. McDaniel was not fraudulently induced into signing the admissions agreement.

[12] Headnote Citing References[13] Headnote Citing References ¶ 19. Lumpkin argues that her daughter, McDaniel, was fraudulently induced into signing the admissions agreement. She again relies on the affidavit of Ladner, the facility administrator, and the fact that Ladner stated that acceptance of the arbitration clause was not a necessary precondition to her admittance to the facility. This statement does not give rise to a defense of fraud. As a contract defense, “[f]raud in the inducement arises when a party to a contract makes a fraudulent misrepresentation, i.e., by asserting information he knows to be untrue, for the purpose of inducing the innocent party to enter into a contract.” Lacy v. Morrison, 906 So.2d 126, 129(¶ 6) (Miss.Ct.App.2004).

[14] Headnote Citing References ¶ 20. The defense of fraud in the inducement would be appropriately raised if, for instance, Ladner had made material misrepresentations to McDaniel when she signed the admissions agreement, and those misrepresentations had been meant to, and did, induce McDaniel to sign the agreement. However, the facts indicate that this is not what happened. As we noted above, all that Ladner's statements demonstrate is that McDaniel could have potentially bargained for a better deal from the facility, i.e. one that did not include the arbitration clause. However, the admissions agreement itself did not contain any false information, it simply contained terms that could have been altered had McDaniel attempted to do so. The fact that she failed to bargain for those terms does not constitute fraud any more than it constitutes a lack of consideration, and therefore McDaniel was not fraudulently induced into signing the admissions agreement.

B. The arbitration clause is substantively conscionable.

\*5 ¶ 21. We come now to the final issue raised in this appeal. Lumpkin asserts that the admissions agreement contains several provisions that have previously been found unconscionable by our supreme court and, as a consequence, this Court should void the entire admissions agreement. In the alternative, Lumpkin argues that the terms of the arbitration clause itself are unconscionable and that we should strike the arbitration clause from the admissions agreement. Although this Court has serious misgivings about the language included in the admissions agreement, we are compelled to confirm the substantive conscionability of the admissions agreement and the arbitration clause.

[15] Headnote Citing References ¶ 22. Lumpkin correctly points out that the admissions agreement her daughter signed contains several clauses that have exactly the same language as clauses in other nursing home admissions agreements that our supreme court has explicitly held are unconscionable. In fact, the admissions agreement in this case appears to be identical to the one at issue in Brown, discussed above. FN1 Specifically, (1) the language in section C5 requiring forfeiture by the resident for all claims except those for willful acts, (2) the language in section C8 waiving liability for the criminal acts of individuals, (3) the “grievance resolution process” set out in sections E5 and E6, (4) the language limiting the recovery of actual damages in section E7, (5) the language limiting the recovery of punitive damages in section E8, (6) the language in section E12 requiring the resident to pay all costs if the resident attempts to avoid or challenge the grievance resolution process, and (7) the language of section E16 that purports to change the statute of limitations were all held to be unconscionable in Brown. Moreover, the last line of the arbitration clause itself contains language identical to language the supreme court struck from the arbitration clause that was at issue in Brown. Seeing no reason to depart from the supreme court's findings in Brown, we agree with Lumpkin's assertion that these clauses in her admissions agreement contain unconscionable language as well. We therefore strike the offending language of clauses C5, C8, E5, E6, E7, E8, E12, and E16, as well as the last line of the arbitration clause from the admissions agreement.

¶ 23. We cannot, however, agree with the remainder of Lumpkin's argument, that because of these unconscionable provisions we must void the entire contract, or that the arbitration clause as a whole should be voided. In Brown, when faced with exactly the same unconscionable language, the supreme court chose to merely sever the unconscionable portions of the admissions agreement and the offending portion of the arbitration clause, and enforce the remaining sections, including compelling the parties to arbitrate. Given the striking similarity of these two cases, including the fact that they involve substantially identical admissions agreements, we are compelled to do the same here as the supreme court did in Brown. Accordingly, we find that the admissions agreement, absent the offending language, is substantively conscionable and the parties are bound by it, including its arbitration clause.

\*6 ¶ 24. THE JUDGMENT OF THE CIRCUIT COURT OF PEARL RIVER COUNTY IS REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEE.