SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3265-21

BRIAN S. BARBERI, as Executor for the ESTATE OF CARMEN M. BARBERI, deceased, and DIANA BARBERI, Individually,

Plaintiffs-Appellants,

v.

1351 OLD FREEHOLD ROAD OPERATIONS LLC d/b/a BEY LEA VILLAGE NURSING AND REHABILITATION CENTER, and GENESIS HEALTHCARE, INC.,

Defendants-Respondents,

and

PAUL LESSIG, D.O.,

Defendant.

———————————————————

Submitted April 18, 2023 – Decided April 28, 2023

Before Judges Sumners and Fisher.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-0738-20.

Gill & Chamas, LLC, attorneys for appellants (Paul K. Caliendo, of counsel; Kaeleigh P. Christie, on the briefs).

Buchanan Ingersoll & Rooney PC, attorneys for respondents 1351 Old Freehold Road Operations LLC d/b/a Bey Lea Village Nursing and Rehabilitation Center and Genesis Healthcare, Inc. (David L. Gordon, Eric D. Heicklen and Evan M. Goldsmith, of counsel and on the brief).

PER CURIAM

On April 18, 2018, when he was eighty-years old and allegedly suffering from a host of physical ailments, Carmen Barberi was admitted to Bey Lea Village, a licensed skilled nursing center in Toms River. He resided there until his death less than a month later. Carmen's executor's commencement of this action for wrongful-death damages was quickly followed by Bey Lea's motion to compel arbitration. After permitting discovery on issues related to whether an enforceable arbitration agreement had been formed, the trial judge entered an order compelling arbitration that the executor appeals, raising questions about whether Carmen signed an arbitration agreement, as well as the alleged agreement's content and enforceability.

Our Legislature has declared that provisions in admission agreements between patients and nursing homes that waive or limit the right to sue for negligence or malpractice are "void as against public policy and wholly unenforceable." N.J.S.A. 30:13-8.1. A case like this suggests why the Legislature would take such a step. According to the judge's assessment of the parties' factual contentions, at the time he was admitted to Bey Lea, Carmen was asked to sign a ninety-seven-page agreement containing a host of provisions. The three-page arbitration provision apparently started at the eighty-ninth page.[1] Bey Lea apparently expected this eighty-year-old man – who had just finished a "prolonged" hospitalization, during which he underwent a cardiac catheterization and coronary artery graft surgery and was, at the time of admission, dealing with bilateral pleural effusion, atrial fibrillation, kidney injury, post-op anemia, fluid retention and chest tube placement – to read through and appreciate the significance of the many terms spread out over the

[1] We say "apparently" because the actual text of the entire arbitration agreement remains uncertain and unresolved. Bey Lea, as it acknowledges in its brief, was unable "to locate the exact pages of the [a]greement that were presented to [Carmen] but do have records confirming which forms were presented to him." In support of its motion to compel arbitration, Bey Lea provided what it labels "an exemplar of the actual [a]greement." What actually was executed is a question to be resolved by the arbitrator.

nearly 100-page document. Carmen may also have required magnifying glasses due to a visual impairment.

If our consideration of the issues was limited to the application of New Jersey law the result would be obvious because N.J.S.A. 30:13-8.1 would preclude enforcement of the arbitration provision; the state policy in favor of arbitration, Garfinkel v. Morristown Obstetrics & Gynecology Assocs., 168 N.J. 124, 131 (2001), would have to take a backseat to a more specific policy that is hostile to arbitration agreements extracted in this setting. But the Supreme Court of the United States has determined that the policy favoring arbitration embodied in the Federal Arbitration Act, 9 U.S.C. §§ 1 - 16, is of such magnitude that contrary state interests are rendered irrelevant. See Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530, 533 (2012). Because Carmen's executor does not dispute that the FAA applies here,[2] we must disregard N.J.S.A. 30:13-8.1 and determine whether the FAA requires the arbitration provision's enforcement.

[2] We invited the parties to submit briefs about whether the FAA applied to this particular arbitration agreement. In his submission, Carmen's executor "acknowledged prior case precedent that nursing home arbitration provisions are governed by the FAA," citing Estate of Ruszala v. Brookdale Living Communities, Inc., 415 N.J. Super. 272 (App. Div. 2010). Consequently, we need not decide here whether the FAA applies to all nursing homes that extract arbitration agreements from their patients.

That is, when the FAA applies, a state court must compel arbitration absent a finding – through the application of state law contract principles – that the parties did not mutually assent or have a meeting of the minds that arbitration would be the exclusive means for resolving their disputes. Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 442 (2014).

And so, having reached that point, we next consider, whether the parties' arbitration provision is sufficiently clear and unambiguous to be enforced through the application of state law. Having examined the language of the arbitration provision, we find no infirmity. The provision clearly states that by signing "the parties are waiving (giving up) their right to have any claim decided in a court of law before a judge and/or jury," and that they instead will resolve their disputes in arbitration:

> Any and all claims or controversies arising out of or in any way relating to this Agreement or the Patient's stay at the Center . . ., including disputes regarding interpretation and/or enforceability of this Agreement, . . . whether sounding in breach of contract, negligence, tort or breach of statutory duties (including, without limitation, claims based on personal injury or death), regardless of the basis for any duty or of the legal theories upon which the claim is asserted, shall be submitted to binding arbitration.

With that, all that remains to be considered is whether Carmen assented to these terms. In reviewing the offered factual information concerning Carmen's

physical ailments and mental acuity, the judge concluded that Carmen freely and voluntarily assented to the terms of the admission agreement. And he found that Carmen actually signed, thereby symbolizing his assent to the admission agreement presented to him. That Carmen was aware of what he was signing is also established by the fact that immediately above his signature, in large lettering, appears a statement expressing that

> THE PARTIES CONFIRM THAT EACH OF THEM HAS READ ALL 4 PAGES OF THIS AGREEMENT, HAS HAD AN OPPORTUNITY TO ASK QUESTIONS ABOUT THIS AGREEMENT, VOLUNTARILY INTENDS TO BE LEGALLY BOUND AND UNDERSTANDS THAT BY SIGNING BELOW, EACH OF THEM HAS WAIVED THE RIGHT TO A TRIAL BY JUDGE OR JURY, EACH UNDERSTANDS THAT THIS AGREEMENT IS VOLUNTARY AND IS NOT A PRECONDITION TO RECEIVING SERVICES AT THE CENTER.

Carmen's executor produced nothing to suggest Carmen was incapable of understanding what he was doing. While he may have been suffering from multiple physical ailments and may have required magnification to read the document, the record reveals that Carmen had been evaluated the day before the admission agreement was executed and the evaluating physician observed there were no issues about Carmen's cognition or ability to understand. The Bey Lea representative who obtained Carmen's signature was deposed and testified that

she went through the arbitration agreement with him. There is nothing in the factual record to refute this.

We also observe that there is no cognizable claim of unconscionability here since Carmen was apparently free to reject the agreement to arbitrate. The arbitration provision stated, not only in the language appearing immediately above the patient's and facility's signatures, but in the body of the arbitration provision itself, that "this agreement is voluntary and not a condition of the Patient's admission into this Center."

Lastly, we observe that the order entered by the trial judge states that issues about the validity of the agreement "shall be submitted to arbitration pursuant to the terms of the [a]greement." We assume from what is implicit in his thorough oral decision that the trial judge left for the arbitrator a determination about the exact content of the admission agreement because Bey Lea was unable to provide the actual agreement that Carmen signed and sought to obtain the enforcement of the arbitration provision by providing an exemplar. See n.1 above. We express no view about this issue; like the trial judge, we leave that question for the arbitrator.

For these reasons, despite our Legislature's clear desire to outlaw arbitration provisions in admission agreements like this, we are constrained to

affirm the order that both compelled arbitration and stayed this lawsuit pending the issuance of an arbitration award.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION