SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4358-15T3

DOROTHY PATTERSON, Administrator
Ad Prosequendum of the Estate of
JAMES PATTERSON, deceased,

Plaintiff-Respondent,

v.

CARE ONE AT MOORESTOWN, LLC,
d/b/a CARE ONE AT MOORESTOWN;
CARE ONE MANAGEMENT, LLC;
HEALTHBRIDGE MANAGEMENT, LLC;

Defendants-Appellants,

and

VIRTUA MEMORIAL HOSPITAL; VIRTUA
MARLTON HOSPITAL; VIRTUA HEALTH, INC.,

Defendants-Respondents.

Submitted January 10, 2017 – Decided February 21, 2017

Before Judges Yannotti and Fasciale.

On appeal from Superior Court of New Jersey, Law Division, Burlington County, Docket No. L-0190-16.

Litchfield Cavo, LLP, attorneys for appellants (Joel I. Fishbein and Zachary Danner, on the briefs).

Swartz Culleton PC, attorneys for respondent Dorothy Patterson (Christopher J. Culleton and Nicholas S. Jajko, on the brief).

Parker McCay, attorneys for respondents Virtua Health, Inc., Virtua-Memorial Hospital Burlington County, Inc., and Virtua-West Jersey Health System, Inc. (Jared L. Silverstein, on the brief).

PER CURIAM

Defendants Care One at Moorestown, LLC, d/b/a/ Care One at Moorestown (COM) and Healthbridge Management, LLC (collectively, Care One) appeal from an order entered by the Law Division on May 27, 2016, which denied their motion to compel arbitration. We affirm.

I.

We briefly summarize the relevant facts and procedural history. Plaintiff is the administrator ad prosequendum of the Estate of James Patterson (Patterson). On September 3, 2014, Patterson was admitted to COM, a facility owned and operated by Care One. Patterson had been diagnosed with various serious health conditions. Patterson's stay at COM was interrupted four times, when he was admitted to Virtua Marlton Hospital or Virtua Memorial Hospital for treatment. Patterson died on November 11, 2014.

On January 26, 2016, plaintiff filed a complaint against Care One and the other defendants. They alleged that due to defendants' negligence and/or recklessness, Patterson suffered serious injuries, including the development and/or deterioration of multiple pressure wounds, and death. Plaintiff asserted a negligence claim, a claim under the Wrongful Death Act, N.J.S.A. 2A:31-1 to -6, and a survival claim under N.J.S.A. 2A:15-3.

In lieu of an answer, Care One filed a motion to compel arbitration pursuant to the COM Admission Agreement (Agreement), a seventeen-page document that Patterson signed on September 3, 2014. The Agreement states in pertinent part:

> ANY CONTROVERSY OR CLAIM ARISING OUT OF OR RELATING TO THIS AGREEMENT AND BROUGHT BY THE RESIDENT, HIS/HER PERSONAL REPRESENTATIVE, HEIRS, ATTORNEYS OR THE RESPONSIBLE PARTY SHALL BE SUBMITTED TO BINDING ARBITRATION BY A SINGLE ARBITRATOR SELECTED AND ADMINISTERED PURSUANT TO THE COMMERCIAL ARBITRATION RULES OF THE AMERICAN ARBITRATION ASSOCIATION [AAA]. A CLAIM SHALL BE WAIVED AND FOREVER BARRED IF, ON THE DATE THE DEMAND FOR ARBITRATION IS RECEIVED, THE CLAIM (IF ASSERTED IN A CIVIL ACTION) WOULD BE BARRED BY THE APPLICABLE STATE OR FEDERAL STATUTE OF LIMITATIONS. ANY CLAIMANT CONTEMPLATED BY THIS PARAGRAPH HEREBY WAIVES ANY AND ALL RIGHTS TO BRING ANY SUCH CLAIM OR [CONTROVERSY] IN ANY MANNER NOT EXPRESSLY SET FORTH IN THIS PARAGRAPH, INCLUDING, BUT NOT LIMITED TO, THE RIGHT TO A JURY TRIAL.

Patterson initialed various provisions of the Agreement, including the arbitration clause.

In addition, the Agreement states in bold print:

> I ACKOWLEDGE THAT I HAVE READ AND UNDERSTAND THIS AGREEMENT BINDING ALL RESIDENT PARTIES (i.e., Resident, Resident's Estate and Responsible Party) AND THE FACILITY TO THE TERMS HEREIN.
>
> I HEREBY CERTIFY THAT I HAVE THE ABILITY AND AUTHORITY TO SIGN THIS AGREEMENT AND AM WILLING TO PROVIDE PROOF OF SUCH AUTHORITY. I ALSO ACKNOWLEDGE THAT I HAVE BEEN GIVEN THE OPPORTUNITY TO REVIEW THIS AGREEMENT AND TO CONSULT WITH LEGAL COUNSEL.

Patterson signed the acknowledgement section of the Agreement, and printed his name below his signature.

The judge heard oral argument on the motion to compel arbitration and placed an oral decision on the record. The judge determined that the arbitration agreement could not be enforced because Care One had not carried its burden of showing that there was a meeting of the minds between the parties to the Agreement. The judge memorialized his decision in an order dated May 27, 2016. Thereafter, Care One filed a notice of appeal.

II.

The judge subsequently filed a lengthy written opinion amplifying his reasons for denying Care One's motion to compel arbitration. The judge noted that Patterson had signed the Agreement, and that in the absence of fraud or duress, it is presumed that a person signing a contract understands and assents

to its terms. The judge noted, however, that there was an issue as to whether Patterson had the requisite capacity to enter into the contract. The judge pointed out that, at the time of his initial admission to COM, Patterson had "multiple serious health issues."

The judge noted that Patterson was eighty-three years old. He arrived at COM on a stretcher from a hospital, where he had been previously admitted after suffering a stroke. Patterson had been diagnosed with "difficulty walking, dysphagia (difficulty swallowing), generalized muscle weakness, cerebrovascular disease, congestive heart failure, hypertension, chronic kidney disease, and unspecified tachycardia."

The judge also noted that a member of the COM nursing staff had completed an evaluation form on the date Patterson was first admitted. It indicated that Patterson's communication was "unclear (slurred)." On the same date, a COM staff member wrote a note which stated that Paterson had a "neurological deficit" and "left facial droop, [or] left hemiparesis." Patterson's cognition was referred to as "alert." Based on the totality of the evidence, the judge found that Patterson's competency at the time he signed the Agreement "is, at a minimum, unclear."

The judge also found that the Agreement was a contract of adhesion, which was set forth on a pre-printed form that is given

to all COM residents and required for admission to the facility. The judge noted that the Agreement included a waiver of the right to a trial, including a jury trial. The judge said the State has a strong public policy of protecting the elderly and infirm. The judge concluded that in view of Patterson's "age, neurological deficit, lack of commercial sophistication and the disparity in bargaining power," there were "indicia of procedural unconscionability."

In addition, the judge pointed out that parties to an agreement could waive the right to seek relief in a court of law, but it must be a knowing waiver. The judge stated that, in view of the issues raised as to Patterson's capacity and the indicia of procedural unconscionability, he could not make a definitive ruling as to whether Patterson made a knowing waiver of his right to seek relief in court.

The judge also rejected Care One's claim that plaintiff should be estopped from challenging the provision of the Agreement requiring arbitration because Patterson received the "ongoing benefit" of the Agreement as a whole. The judge determined that Patterson or his estate presumably paid for the benefits due to him under the Agreement, and "received nothing additional in consideration for his agreement to arbitrate." The judge wrote, "[n]othing in equity requires the court to compel one party to

arbitrate when the other party is not bound, particularly when the other party had superior bargaining power and drafted the contract which [Patterson] may or may not have even had the capacity to understand."

The judge further found that Care One had the burden of showing by a preponderance of the evidence that there was a meeting of the minds necessary to form an agreement. The judge stated that there was no indication that Patterson was provided with the AAA arbitration rules, which are "complex and voluminous to the lay person." There also was no indication that Patterson was afforded the right to rescind the agreement or an opportunity to consult with a lawyer.

The judge again noted the context in which the Agreement was executed, and Patterson's condition at the time. The judge referenced the State's strong public policy to protect the elderly and infirm, particularly those who are residents of nursing homes. The judge concluded that the arbitration clause could not be enforced because the Agreement is "invalid for a lack of evidence regarding a meeting of the minds."

III.

On appeal, Care One argues that: (1) arbitration should be compelled because the Federal Arbitration Act (FAA), 9 U.S.C.A. §§ 1 to 16, favors arbitration, and judicial precedent under the

FAA is controlling; (2) the threshold question of whether the arbitration clause should be enforced must be decided by an arbitrator, not the court; (3) the arbitration clause must be enforced unless plaintiff sustains her burden of proving the agreement to arbitrate is unconscionable; (4) the arbitration clause is enforceable because plaintiff cannot sustain her burden of proving that there was not a meeting of the minds or that the arbitration clause is unconscionable; (5) the arbitration agreement is enforceable as to the wrongful death claims; and (6) plaintiff is estopped from attempting to disavow the arbitration clause when Patterson derived the benefit of the bargain regarding every other undertaking in the Agreement.

We note initially that, "[o]rders compelling or denying arbitration are deemed final and appealable as of right." Dispenziere v. Kushner Cos., 438 N.J. Super. 11, 15 (App. Div. 2014) (citing R. 2:2-3(a); GMAC v. Pittella, 205 N.J. 572, 587 (2011)). We exercise de novo review of a trial court's decision on the enforceability of an arbitration clause. Morgan v. Sanford Brown Inst., 225 N.J. 289, 302-03 (2016) (citing Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 446 (2014), cert. denied, ___ U.S. ___, 135 S. Ct. 2804, 192 L. Ed. 2d 847 (2015)). Whether an arbitration clause is enforceable is a legal issue; therefore, we afford no special deference to the trial court's determination

of that issue. Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 186 (2013).

As noted, Care One argues that the trial court failed to follow the controlling federal policy favoring arbitration which is reflected in the FAA. Care One contends that the trial court exhibited a hostility to arbitration, which the FAA was intended to counteract. We disagree.

Here, the motion judge correctly recognized that the FAA establishes a "liberal federal policy favoring arbitration." AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339, 131 S. Ct. 1740, 1745, 179 L. Ed. 2d 742, 751 (2011) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 103 S. Ct. 927, 947, 74 L. Ed. 2d 765, 785 (1983)). The FAA also requires that courts "place arbitration agreements on an equal footing with other contracts and enforce them according to their terms." Id. at 339, 131 S. Ct. at 1745-46, 179 L. Ed. 2d at 751 (citations omitted).

However, as the Court observed in Atalese, although arbitration has a "favored status," this does not mean that all arbitration agreements should be enforced. Atalese, supra, 219 N.J. at 441. Indeed, the FAA "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses[.]'" Concepcion, supra, 563 U.S. at 339, 131 S. Ct. at 1746, 179 L. Ed.

2d at 751 (quoting Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687, 116 S. Ct. 1652, 1656, 134 L. Ed. 2d 902, 909 (1996)).

Therefore, a court can refuse to enforce an arbitration clause "upon such grounds as exist at law or in equity for the revocation of any contract." Martindale v. Sandvik, Inc., 173 N.J. 76, 85 (2002) (quoting 9 U.S.C.A. § 2); see also Hojnowski v. Vans Skate Park, 187 N.J. 323, 342 (2006) ("[S]tate contract-law principles generally govern a determination whether a valid agreement to arbitrate exists." (citing First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944, 115 S. Ct. 1920, 1924, 131 L. Ed. 2d 985, 993 (1995))).

Here, the trial court correctly found that a necessary element to any agreement is a meeting of the minds. See NAACP of Camden Cty. E. v. Foulke Mgmt. Corp., 421 N.J. Super. 404, 424-25 (App. Div. 2011) (noting that "an agreement to arbitrate must be the product of mutual assent, as determined under customary principles of contract law." (citations omitted)). The record supports the trial court's determination that there was no meeting of the minds between the parties in this matter.

The judge noted that Patterson had initialed some but not all of the terms of the Agreement. There was no indication that any of the supplemental documents referred to in the Agreement had been provided to Patterson. There was no indication that Patterson

had been provided with a copy of the AAA arbitration rules, which the judge said are "complex and voluminous to the lay person." There also was no indication that Patterson was given the opportunity to rescind the agreement or consult with an attorney regarding its terms.

Moreover, the motion judge did not err by considering Patterson's physical condition and the circumstances in which he signed the Agreement. As the judge pointed out, when Patterson signed the agreement, he was eighty-three years old. He had recently been hospitalized after suffering a stroke. Patterson was taken from the hospital to COM on a stretcher, which the judge noted was "a clear indication" that he was infirm.

Furthermore, Patterson had been diagnosed with a variety of serious ailments, including congestive heart failure, hypertension, and chronic kidney disease. His speech was slurred, and COM's staff noted that Patterson had a neurological deficit, specifically a "left facial droop."

The record therefore supports the judge's conclusion that there was insufficient evidence of a meeting of the minds between Care One and Patterson regarding the terms of the Agreement, including the arbitration clause. The judge's refusal to enforce the Agreement and compel arbitration is consistent with contract law principles and permissible under the FAA.

Care One argues, however, that the issue as to whether plaintiff's claims are subject to arbitration should have been reserved for the arbitrator and not decided by the trial court. Care One notes that the Agreement states that the claims arising under or relating to the Agreement shall be subject to arbitration in accordance with the AAA rules.

Care One maintains that Rule 7(a) of AAA's Commercial rules give the arbitrator power to rule on the issue of jurisdiction, including "any objections with respect to the existence, scope, or validity of the arbitration agreement, or to the arbitrability of any claim or counterclaim." Care One contends that the incorporation of the AAA rules in the Agreement reflects an expression of the parties' intent to have issue of arbitrability decided by the arbitrator rather than the court.

We find no merit in these arguments. As we have explained, the evidence supports the trial court's determination that there was never a meeting of the minds between the parties and, therefore, no enforceable agreement between the parties.

Furthermore, in view of Patterson's condition and the circumstances under which he signed the Agreement, it cannot be said that the mere reference to the AAA rules in the arbitration clause shows that Patterson clearly and unmistakably intended to have any issue of arbitrability decided by an arbitrator and not

the court. See also Morgan, supra, 225 N.J. at 306 (noting that an arbitration agreement must have a "clearly identifiable" provision delegating the issue of arbitrability to an arbitrator).

We have considered Care One's other arguments and conclude that they are without sufficient merit to warrant discussion in this opinion. R. 2:11-3(e)(1)(E).

Affirmed.