IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Carol Kurzeja Dunne, as independent executor of the estate of Joan M. Kurzeja, deceased,	)	
Plaintiff,	)	
v.	)	No. 2019 L 4290
Manor Care of Palos Heights IL, LLC, an Illinois limited liability company d/b/a Manor Care Health Services-Palos Heights East, Manor Care Health,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

The Federal Arbitration Act compels arbitration if the parties executed an arbitration agreement. Under Illinois law, however, a binding contract exists only if a party had sufficient mental capacity at the time of execution. Here, the defendants have failed to show the plaintiff was competent at the time she signed an arbitration agreement; consequently, this court must deny the defendant's motion to dismiss and compel arbitration.

Facts

On January 30, 2012, Joan Kurzeja appointed her daughter, Carol Dunne, as power of attorney for property. The short form power of attorney for property states that: "[t]his power of attorney shall become effective upon my disability, as determined in writing by my treating physician." The power of attorney includes decisions for claims, litigation, and all other property transactions.

In late April 2017, Little Company of Mary Hospital admitted Kurzeja subsequent to a fall. Daily reports from April 29 through May 5, 2017 signed by more than one physician assessed Kurzeja with moderate to severe cognitive impairment and poor functional status. On May 5, 2017, other Little Company records indicated Kurzeja had advanced dementia, metabolic encephalopathy, and a urinary tract infection. Also on May 5, 2017, Manor Care of Palos Heights East admitted Kurzeja as a resident. The same day, Dunne signed a psychotropic medication consent form on her mother's behalf.

On May 6, 2017, apparently without Dunne being present, Kurzeja executed a voluntary arbitration agreement on her own behalf in which she agreed to waive any right to a bench or jury trial in favor of arbitration. The agreement provides that, "any dispute or controversy which may arise" between the parties, the patient and the Center, "will be resolved exclusively through binding arbitration." At some point after Kurzeja became a resident at Manor Care, Dr. Hamdi Khilfeh, a Little Company physician who also served as Manor Care's in-house physician, signed an undated letter stating that Kurzeja was unable to make her own decisions and that her power of attorney would make them.

Kurzeja resided at Manor Care until May 20, 2017. On that date, Kurzeja fell, resulting in a right ankle fracture and an admission to Palos Hospital. On May 22, 2017, Dunne signed a consent form for an open reduction and internal fixation of Kurzeja's right ankle. On May 24, 2017, Palos Hospital, again, obtained Dunne's consent to show that she understood Kurzeja's Medicare rights. The fracture and post-surgical recuperation left Kurzeja bedbound, a condition that ultimately resulted in the development of pressure ulcers. Kurzeja's clinical condition required supervision and assistance with the activities required for daily living. On September 20, 2017, Kurzeja died.

On April 22, 2019, Dunne, as independent executor of her mother's estate, filed a seven-count complaint against various

defendants. On June 17, 2019, defendants filed a motion to dismiss and compel arbitration. In compliance with this court's order, the parties deposed Khilfeh as to the substance of his undated letter. Dunne then filed a response, and the defendants replied. This court has read the parties' submissions.

Analysis

The defendants have brought their motion pursuant to Code of Civil Procedure section 2-619. *See* 735 ILCS 5/2-619. A section 2-619 motion to dismiss admits the legal sufficiency of the complaint, but raises defects, defenses, or some other affirmative matter appearing on the face of the complaint or established by external submissions to defeat the plaintiff's claim. *Ball v. County of Cook*, 385 Ill. App. 3d 103, 107 (1st Dist. 2008). If the affirmative matter involves issues of law and easily proved issues of fact, a section 2-619 motion is an appropriate vehicle to resolve those issues at the outset of the litigation. *Henry v. Gallagher*, 383 Ill. App. 3d 901, 903 (1st Dist. 2008). The phrase "affirmative matter" means "some kind of defense 'other than a negation of the essential allegations of the plaintiff's cause of action.'" *Smith v. Waukegan Park Dist.*, 231 Ill. 2d 111, 120–21 (2008) (quoting *Kedzie & 103rd Currency Exch. v. Hodge*, 156 Ill. 2d 112, 115 (1993)). Unless the affirmative matter asserted is apparent on the face of the complaint, a section 2-619 motion must be supported by an affidavit or some other material that could be used to support a summary judgment motion. *Kedzie*, 156 Ill. 2d at 116.

In ruling on a section 2-619 motion, a court may consider the pleadings, depositions, and affidavits on file. *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 262 (2004). A court must construe the pleadings and supporting documents in the light most favorable to the plaintiff, accepting as true all well-pleaded facts in the complaint and drawing all reasonable inferences in the plaintiff's favor. *Capeheart v. Terrell*, 2013 IL App (1st) 122517, ¶ 11. A party moving for dismissal under section 2-619, "has the burden of proof on the motion, and the concomitant

burden of going forward." *Reynolds v. Jimmy John's Enters.*, 2013 IL App (4th) 120139, ¶ 37.

The defendants argue that the arbitration agreement Kurzeja executed is valid under federal law and, therefore, Dunne's claim must be sent to arbitration. According to the defendants, the record is void of any evidence showing a lack of understanding on Kurzeja's part or impropriety in the process leading up to the agreement. The defendants correctly point out that an executed arbitration agreement was not a condition of Kurzeja's admission or receipt of medical care and treatment at Manor Care. In sum, there is no factual basis to assert Kurzeja lacked a meaningful choice. At the same time, the defendants acknowledge that a non-party to an arbitration agreement cannot be compelled to arbitrate a wrongful death claim. To that extent, the defendants request that, if this court does not order all claims to arbitration, the wrongful death claims be stayed pending arbitration on the survival claims.

In response, Dunne argues that Kurzeja lacked the necessary mental capacity and was also severely hearing impaired when she executed the arbitration agreement. As a result of Kurzeja's mental incapacity, Dunne acted as Kurzeja's power of attorney for healthcare and power of attorney for property.[1] Throughout Kurzeja's residency at Manor Care, Dunne approved all consents for healthcare and property decisions including vaccinations, procedures, medications, and screenings. Dunne also argues that she had signed other consent forms on Kurzeja's behalf at the defendant's facility and at Palos Hospital, demonstrating the defendants' knowledge that Dunne made all of Kurzeja's healthcare and property decisions. According to Dunne, the arbitration agreement Kurzeja signed is invalid because she had already been declared incapacitated and her healthcare and property decisions were no longer in her control. Dunne also

[1]Kurzeja's husband, John, had been appointed power of attorney for healthcare on March 21, 2005, but had died by the time she signed the arbitration agreement.

argues the arbitration agreement is both procedurally and substantively unconscionable as a result of the defendants' actions.

In *Henry Schein, Inc. v. Archer & White Sales, Inc.*, the United States Supreme Court held that under the Federal Arbitration Act, the question of who decides arbitrability is a question of contract and that the FAA allows parties to agree by contract to resolve their dispute through arbitration rather than court. *See* 586 U.S. ___, 139 S. Ct. 524, 527 (2019). The Court also held that the question of who decides arbitrability is itself a question of contract. *See id.* If, however, a party challenges an arbitration agreement's validity, a court is to address first the provision's enforceability. *See Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 70 (2010). As the Illinois Supreme Court recognized, "an arbitration agreement may be invalidated by a state law contract defense of general applicability, such as fraud, duress, or unconscionability, without contravening section 2 [of the Federal Arbitration Act]." *Carter v. SSC Odin Operating Co.*, 2012 IL 113204, ¶ 18 (citing 9 U.S.C. § 1 *et seq.*). Another recognized defense is the capacity to contract, which requires a party have sufficient mental ability to appreciate the effect of entering into an agreement through the exercise of personal will. *See Thatcher v. Kramer*, 347 Ill. 601, 609 (1932); *In re Marriage of Davis*, 217 Ill. App. 3d 273, 276 (5th Dist. 1991).

The available evidentiary record shows that doctors consistently found Kurzeja lacking competency prior to her executing the May 6, 2017 arbitration agreement. Various Little Company physicians, including Khilfeh, signed records assessing Kurzeja with moderate to severe cognitive impairment before her admission to Manor Care. Indeed, on the day of her transfer to Manor Care, Little Company records assessed Kurzeja with advanced dementia, metabolic encephalopathy, and a urinary tract infection (the latter of which Khilfeh testified could lead to confusion). Those records, alone, are sufficient to trigger the operative language in the power of attorney – "[t]his power of attorney shall become effective upon my disability, as determined

in writing by my treating physician." These pre-admission records by multiple physicians make Khilfeh's undated letter an after-the-fact recordation of what he and other physicians had already determined – that Kurzeja lacked mental capacity. In other words, Khilfeh's undated letter after Kurzeja's admission to Manor Care does not support the conclusion that Kurzeja had sufficient mental capacity on May 6, 2017 to execute the arbitration agreement.

In the face of this record, the defendants have not presented any contrary evidence establishing Kurzeja's mental fitness. This lack of evidence makes it unnecessary to address Dunne's additional arguments that the arbitration agreement was procedurally and substantively unconscionable. In sum, the arbitration agreement cannot be enforced against Kurzeja's estate as to the Survival Act claims.

Conclusion

Based on the foregoing, it is ordered that:

1. the defendants' motion to dismiss and compel arbitration is denied; and
2. the parties shall submit an agreed Rule 218 category two case management order no later than September 9, 2020.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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