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

Debra Musielak, as independent administrator of the estate of Betty Mazeika, deceased	)	
Plaintiff,	)	
v.	)	No. 19 L 12360
Manor Care of Palos Heights IL, LLC, and Concord Nursing and Rehabilitation Center, LLC d/b/a Aperion Care Oak Lawn,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Illinois law distinguishes between a healthcare power of attorney and a financial power of attorney. In this case, the plaintiff lacked authority under a healthcare power of attorney to bind the decedent to an arbitration agreement that was independent of the decedent's nursing home admission agreement. The defendant's motion to dismiss and compel arbitration must, therefore, be denied.

Facts

On April 29, 2013, Betty Mazeika executed a power of attorney for healthcare naming her daughter, Debra Musielak, as healthcare power of attorney. On March 29, 2018, Betty became a resident at Aperion Care Oak Lawn. Before Betty entered Aperion, Debra executed various documents on Betty's behalf, including an Arbitration and Limitation of Liability Rider to Admission Contract that states, in part:

> The parties agree that any and all disputes arising out of or in any way related to the contract or the Resident's stay at the facility between: a) the Resident or his/her spouse, heirs or assigns; and b) Operator or its affiliates, officers, directors, agents, license holders, managers, or employees shall be decided by arbitration in accordance with this Rider.

The parties have not identified language in any document conditioning Betty's residency on the execution of the arbitration agreement. The absence of such language is consistent with the fact that the arbitration agreement is not included in Aperion's admissions checklist.

On February 21, 2019, Betty died. The probate court later appointed Debra as the independent administrator of Betty's estate. On November 7, 2019, Debra filed a five-count complaint against the defendants. As to Aperion, Debra brings counts three and four under the Nursing Home Care Act and the Survival Act, respectively; she brings count five pursuant to the Wrongful Death Act. In each count, Debra alleges that Aperion's staff breached the duty of care owed to Betty. Debra claims that Aperion's staff negligently failed to: (1) assess Betty's risk of falls; (2) develop, implement, and revise a care of plan to address that risk; (3) supervise and monitor Betty; and (4) timely transfer Betty to a hospital after she fell twice. Debra alleges that those failures resulted in Betty suffering a subdural hematoma and a fractured wrist.

On January 28, 2020, Aperion filed a motion to enforce the arbitration agreement and dismiss all claims with prejudice, or, in the alternative, to stay all claims pending arbitration. On March 18, 2020, Debra filed a response, and on April 30, 2020, Aperion filed a reply. This court has reviewed each of the parties' submissions, including exhibits.

Analysis

Aperion brings its motion to dismiss pursuant to Code of Civil Procedure section 2-619(a)(9). *See* 735 ILCS 5/2-619(a)(9). 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 that defeats the plaintiff's claim. *See id*; *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 means to resolve those issues at the outset of the litigation. *Van Meter v. Darien Pk. Dist.*, 207 Ill. 2d 359, 367 (2003). "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 Pk. Dist.*, 231 Ill. 2d 111, 120-21 (2008) (quoting *Kedzie & 103rd Currency Exch. v. Hodge*, 156 Ill. 2d 112, 115 (1993)). If the affirmative matter asserted is not apparent on the face of the complaint, a section 2-619 motion must be supported by an affidavit or some other material similar to that supporting 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. *See Czarobski v. Lata*, 227 Ill. 2d 364, 369 (2008); *Calloway v. Kinkelaar*, 168 Ill. 2d 312, 324 (1995). 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.

Aperion's central argument is that the arbitration agreement provides the exclusive remedy for resolving all claims related to the contract or Betty's stay at Aperion. The arbitration agreement provides that the Federal Arbitration Act governs the

arbitration and mandates courts to compel arbitration and stay proceedings if the dispute is within the scope of the arbitration clause. The arbitration agreement expressly provides that, if arbitration is chosen with respect to a claim, there is no right to try that claim in court and no right to a jury trial. According to Aperion, the existence of arbitration as the exclusive remedy and the FAA's governance means that all claims should be dismissed for lack of subject matter jurisdiction, or, alternatively, the Wrongful Death Act claims be stayed pending completion of the arbitration.

Debra argues that the arbitration agreement identifies Betty as a "Resident" and Aperion as the "Operator," but Debra's signature is the only one on the agreement, and she did not have express authority to sign on Betty's behalf. Further, since the arbitration agreement was not mandatory for Betty's admission to Aperion, the document falls outside the authority of a healthcare power of attorney. Debra also argues that the arbitration agreement is both substantively and procedurally unconscionable. The agreement is substantively unconscionable because it supersedes the rights granted to Betty through the Illinois Nursing Home Care Act and is procedurally unconscionable because Debra, not Betty, signed the agreement.

The current dispute lies at the intersection of three areas of law – statutes, arbitration, and contracts. By way of background, the legislature enacted a statutory short form power of attorney for healthcare. 755 ILCS 45/4-10. The statute authorizes the designated agent "to make any and all health care decisions on behalf of the principal," including admission and discharge "from any and all types of hospitals, institutions, homes, residential or nursing facilities, treatment centers, and other health care institutions. . . ." 755 ILCS 45/4-10(c). The statute also has an enabling clause that gives the agent the authority to carry out other powers such that the agent, "may sign and deliver all instruments, negotiate and enter into all agreements and do all other acts reasonably necessary to implement the exercise of the powers granted. . . ." *Id.* Courts have, however, acknowledged the

statute's reach. As noted, "the general rule limits the scope of a health-care power of attorney to matters involving the principal's health care and that the agent is given no authority over the principal's property or financial matters." *Fiala v. Bickford Senior Living Grp.*, LLC, 2015 IL App (2d) 141160, ¶ 40 (citing *In re Estate of Stahling*, 2013 IL App (4th) 120271 (short form healthcare power of attorney did not create fiduciary relationship in which property transactions between the principal and agent resulted in a presumption of undue influence)).

As to the confluence of arbitration and contracts, it is plain that arbitration agreements are contracts, *Carr v. Gateway*, 241 Ill. 2d 15, 20 (2011), and are interpreted in the same way and according to the same rules as other contracts. *See State Farm Fire & Casualty Co. v. Watts Regulator Co.*, 2016 IL App (2d) 160275, ¶ 27 (citing *J & K Cement Construction, Inc. v. Montalbano Builders, Inc.*, 119 Ill. App. 3d 663, 669 (2d Dist. 1983)). As in all instances, the primary objective in construing a contract is to give effect to the parties' intent. *See Gallagher v. Lenart*, 226 Ill. 2d 208, 232 (2007). Intent is discerned from the contract's language, by giving each provision its plain and ordinary meaning, and by viewing each provision within the context of the entire agreement. *See id.* at 233.

If an arbitration agreement provides that "gateway" questions of arbitrability, enforceability, or unconscionability are to be decided by the arbitrator, a court is to enforce the arbitration agreement as a matter of contract. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 69-70 (2010). If, however, a party challenges the arbitration provision's enforceability or validity, a court is to address first the provision's enforceability. *Id.* at 70. 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.*).

Illinois courts have previously addressed whether an agent acting pursuant to a statutory short form power of attorney for healthcare is authorized to execute a binding arbitration agreement on another person's behalf as part of an admission to a long-term care facility. *See Fiala*, 2015 IL App (2d) 141160; *cf. Curto v. Illini Manors, Inc.*, 405 Ill. App. 3d 888, 891 (3d Dist. 2010). In *Fiala*, the facility's admission agreement included an arbitration provision requiring the resident to arbitrate all claims or disputes arising out of the agreement, and the resident's healthcare power of attorney executed the agreement. *Id.* ¶ 29. The court held that, under those circumstances, the resident's healthcare power of attorney had authority to execute agreements on the resident's behalf. *Id.* ¶ 38. As the court explained, "if an arbitration provision is required for admission to a care facility then it becomes part and parcel of the health-care decision to admit the patient to the facility." *Id.* ¶ 45. The *Fiala* court emphasized, however, that the arbitration clause was "neither optional nor freestanding;" therefore, the healthcare power of attorney had the authority to bind the resident to the arbitration clause because, "it was part of the establishment contract that gained [the resident] admission into [the] defendant's facility." *Id.* The *Fiala* court carefully distinguished its facts from cases in other states in which courts refused to enforce arbitration agreements in the converse situation, that is, "where the arbitration provision is optional or otherwise not necessary to gain admission to a long-term-care facility, [in which case] the agent acting pursuant to a health-care power of attorney is not authorized to sign the arbitration provision and the patient cannot be bound by the agent's action." *Id.* at ¶ 44 (citing *Dickerson v. Longoria*, 414 Md. 419, 448-49 (2010); *Life Care Ctrs. of Am. v. Smith,* 298 Ga. App. 739, 742 (Ga. Ct. App. 2009); *Koricic v. Beverley Enterprises-Neb., Inc.*, 278 Neb. 713, 719 (2009)).

In contrast is *Curto*, in which a court found that a wife lacked the authority to execute an arbitration agreement as part of her husband's admission to a care facility. In *Curto*, there was no evidence that the husband had executed a power of attorney in his wife's favor. 405 Ill. App. 3d at 892-93. Equally important to

the court was the fact that the arbitration agreement was independent of the contract for admission to the facility. *Id.* at 890. *Curto* thus follows the line of cases holding that a separate arbitration agreement is outside the power of the agent exercising the right to make healthcare decisions. *Id.* ¶ 46 (citing cases).

The only conclusion that may be drawn from the facts in this case and the applicable law cited above is that Debra had no authority to bind Betty to the arbitration agreement. First, the arbitration agreement identifies Betty and Aperion as the contracting parties, but only Debra executed the agreement. Debra's execution of the agreement, by itself, is therefore not proof of Debra's authority. Second, it is true that Debra had Betty's healthcare power of attorney, but that power did not explicitly authorize Debra to sign an independent, arbitration agreement on Betty's behalf. As noted above, *Fiala* plainly distinguishes between a healthcare power of attorney and a financial power of attorney, and the decision to enter into an arbitration agreement is not within the authority of a healthcare power of attorney. Third, the arbitration agreement was free standing and not required for Betty's admission to Aperion as evidenced by the facility's admissions checklist. In sum, Debra had no authority to bind Betty to the arbitration agreement.

This court's determination that Debra was not authorized to execute the arbitration agreement on Betty's behalf, makes it unnecessary to address whether the agreement was either procedurally or substantively unconscionable.

Conclusion

For the reasons presented above,

It is ordered that:

Aperion's motion to dismiss and compel arbitration is denied.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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