2019 IL App (3d) 180103-U

Order filed March 19, 2019

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2019

WARREN NELSON, Individually, and as Independent Administrator of the Estate of MARGARET CAMPBELL, Deceased,	)	Appeal from the Circuit Court of the 9th Judicial Circuit, Knox County, Illinois,
Plaintiff-Appellant,	)	
(Thomas Campbell,	)	
Plaintiff-Appellant)	)	Appeal No. 3-18-0103
	)	Circuit No. 17-L-36
v.	)	
HEARTLAND OF GALESBURG IL, LLC d/b/a HEARTLAND HEALTH CARE CENTER-GALESBURG, and PAUL ORMOND,	)	Honorable Scott Shipplett,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Presiding Justice Schmidt and Justice O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court erred when it granted the defendants' motions to dismiss and compelled arbitration.

¶ 2 The former plaintiff, Thomas Campbell, individually and as independent administrator of

the estate of Margaret Campbell, his deceased wife, brought a complaint against the defendants, Heartland of Galesburg IL, LLC (Heartland), a nursing home, and Paul Ormond, the alleged owner of Heartland, for the care and treatment Margaret received while she was at Heartland. Heartland filed a motion to dismiss and compel arbitration, which the court granted with prejudice. Ormond also filed a motion to dismiss, which the court also granted with prejudice.

¶ 3 Thomas appealed. After subsequently pleading guilty to a felony, Thomas filed a motion with the trial court and this court to substitute Warren Nelson, Margaret's brother, as the plaintiff in this case. Both the trial court and this court granted the motions to substitute.

¶ 4 FACTS

¶ 5 Thomas and Margaret were married in 1969. Margaret never created a will, appointed any kind of power of attorney, or provided a living will with advance directives in the event she would be unable to make decisions for herself. In July 2015, Margaret suffered a ruptured aneurysm and stroke. On August 25, 2015, Margaret was admitted at Heartland. On August 26, 2015, Thomas signed an "Admission Agreement" as Margaret's "Responsible Party." The Admission Agreement required Thomas to provide information about Margaret's finances, be responsible for all charges incurred, and transfer/accept Margaret when appropriate. Thomas also signed an "Arbitration Agreement" as Margaret's "Legal Representative" that day. The Arbitration Agreement provided that the parties were waiving their right to a trial before a judge or jury in case of any dispute arising out of the Admission Agreement, including claims for malpractice. The Arbitration Agreement also included the following clause, "The Parties hereby stipulate that the decision to have the Patient move into [Heartland] and the decision to agree to this Agreement are each a health care decision."

¶ 6 In April 2016, Margaret passed away. In August 2017, Thomas was appointed as

independent administrator of Margaret's estate and filed a complaint against the defendants arising out of the care and treatment she received at Heartland under the Nursing Home Care Act (210 ILCS 45/1-101 *et seq.* (West 2016)), the Probate Act of 1975 (755 ILCS 5/27-6 (West 2016)), and the Rights of Married Persons Act (750 ILCS 65/15 (West 2016)). Thomas alleged that the defendants and their employees failed to assess and address Margaret's risk for skin breakdown during her admission, which resulted in the development of a coccyx pressure injury.

¶ 7 In September 2017, Heartland filed a motion to dismiss and to compel arbitration (735 ILCS 5/2-619(a)(1), (9) (West 2016)) and attached the Arbitration Agreement and Admission Agreement as exhibits. Heartland argued that the Arbitration Agreement was valid under an agency theory and on the basis that Thomas was Margaret's surrogate decision-maker. Thus, Heartland argued Thomas was barred from filing his complaint in the trial court. Thomas responded that the Arbitration Agreement was unenforceable because (1) he had no authority to enter into the agreement as Margaret's legal representative, (2) he never had power of attorney or power of attorney for health care for Margaret, (3) it did not specify Heartland was a party to the agreement, and (4) it was unconscionable and not supported by consideration. Thomas attached an affidavit to his response wherein he stated, "At no time did I have a power of attorney for my wife" and "[a]t no time did I have a power of attorney for healthcare for my wife."

¶ 8 In November 2017, Thomas testified by deposition. Thomas stated that he authorized Margaret's transfer and admission to multiple hospitals and nursing facilities, authorized multiple surgeries, authorized the destruction of one of Margaret's automobiles, canceled Margaret's automobile insurance, paid their joint bills out of their joint checking account and admitted to being Margaret's surrogate decision-maker following her July 2015 stroke until her death. Thomas had no recollection of signing the Arbitration Agreement in August 2015.

¶ 9 Heartland responded to Thomas's response to Heartland's motion to dismiss and compel arbitration and argued that his deposition transcript, which Heartland attached as an exhibit, showed that Thomas had authority to enter into the Arbitration Agreement as Margaret's agent.

¶ 10 Ormond also moved for dismissal, but argued that he was an improper party as he was not the owner of Heartland (735 ILCS 5/2-619(a)(9) (West 2016)). Ormond attached a copy of the Limited Liability Company Agreement of Heartland of Galesburg, which identified HCR IV Healthcare, LLC as Heartland's sole equity member. Thomas responded that Ormond was a proper party, as an owner of Heartland, and attached a printout from the Illinois Department of Public Health's website that identified Ormond as having an 8.7% ownership in Heartland. Thomas argued that Ormond failed to provide any information proving that he was not the owner of Heartland even though that information had been repeatedly requested.

¶ 11 The trial court found that the Arbitration Agreement was valid and should be enforced. The court considered the fact that Thomas and Margaret were married for over 40 years and he was entitled to make health care decisions for her without being questioned. Thus, the court found that Heartland showed that Thomas had actual and apparent authority to enter into the Arbitration Agreement. The court rejected Thomas's arguments. Therefore, the court granted Heartland's motion to dismiss with prejudice and ordered the parties to proceed to arbitration. As to Ormond, the court held that the printout provided by Thomas from the Illinois Department of Public Health's website was insufficient to overcome the LLC Agreement and Ormond was an improper party. Thus, the court granted Ormond's motion to dismiss with prejudice.

¶ 12 This appeal followed.

¶ 13 ANALYSIS

¶ 14 On appeal, Nelson raises two arguments. First, he argues that the trial court erred when it

granted Heartland's motion to dismiss with prejudice and compelled arbitration. Second, he argues that the court erred when it granted Ormond's motion to dismiss with prejudice. Heartland argues the court's rulings were proper. We address each of these arguments in turn.

¶ 15 I. Heartland' Motion to Dismiss and Compel Arbitration

¶ 16 Nelson argues that the trial court erred when it granted Heartland's motion to dismiss with prejudice and compelled arbitration because: (1) Thomas did not have actual or apparent authority to enter into the Arbitration Agreement, (2) Heartland failed to demonstrate that the Arbitration Agreement was signed by a representative of the limited liability company that was an owner of Heartland, (3) the Arbitration Agreement was procedurally and substantively unconscionable, and (4) the Arbitration Agreement was not supported by consideration.

¶ 17 As an initial matter, the parties dispute as to whether our standard of review of this issue is *de novo* or abuse of discretion. This court has stated, "where the trial court does not make any factual findings, *or the underlying facts are not in dispute and the court's decision is based on a purely legal analysis*, we review the trial court's denial of a motion to stay the proceedings and compel arbitration *de novo.*" (Emphasis added.) *Curto v. Illini Manors, Inc.*, 405 Ill. App. 3d 888, 891 (2010) Here, it is evident from the record that the trial court made factual findings in reaching its determination in this case. However, as Heartland concedes, those facts were never disputed. Also, the trial court's discussion of those facts was within the context of its legal analysis. Thus, we review this issue *de novo*. See *id.*

¶ 18 We address Nelson's first argument, whether Thomas had actual or apparent authority to enter into the Arbitration Agreement, because we find it resolves this issue. We rely heavily on this court's previous analysis in *Curto*, because the facts and issues are indistinguishable. We note that the party asserting an agency relationship has the burden to prove such relationship by a

preponderance of the evidence. *Id.* at 892. Thus, Heartland had the burden to prove Thomas was Margaret's agent by a preponderance of the evidence. Additionally, "[t]he status of the parties as husband and wife, by itself, does not create an agency relationship." *Id.* at 891.

¶ 19 In *Curto*, a residential nursing home operating under the name of Pekin Manors, presented a contract to the plaintiff, Marilee, when she admitted her husband, Charles, into its care. *Id.* at 890. The contract named Charles as the resident and Marilee as the guardian/responsibly party. *Id.* Marilee signed the contract, which designated her as the "Legal Representative." *Id.* Marilee and Pekin Manors also entered into a separate arbitration agreement, which stated that any and all disputes shall be submitted to arbitration and waived the parties' right to a trial by jury. *Id.* Marilee signed the arbitration agreement as the "Resident Representative." Charles neither signed the contract nor the arbitration agreement. *Id.*

¶ 20 Thereafter, Marilee filed an action against Pekin Manors for personal injuries Charles sustained while under its care and his wrongful death. *Id.* Pekin Manors moved to dismiss the complaint and compel arbitration, arguing that under an agency theory, the estate was contractually bound by the arbitration agreement signed by Marilee when Charles was admitted. *Id.* at 891. The trial court denied the motion, finding that " 'the spouse is not an agent for the other spouse for purposes of an agreement to arbitrate.' " *Id.* Thus, the court concluded the arbitration agreement was not valid and enforceable because there was no indication Marilee had authority to bind Charles to the mandatory arbitration terms of the contract. See *id.* Pekin Manors appealed, arguing Marilee had actual and apparent authority to act as Charles's agent.

¶ 21 A. Actual Authority

¶ 22 First, in its *de novo* review, the *Curto* court analyzed whether Marilee had actual authority to act as Charles's agent, which would allow her to legally bind him to the terms of the

arbitration agreement. Actual authority may be express or implied. *Id.* at 892. Express authority exists where the principal directly granted the agent authority, in express terms, and extends only to powers the principal confers upon the agent. *Id.* For example, express authority may be granted through a written agreement, a power of attorney, or a court-ordered guardianship. *Id.* In contrast, implied authority is actual authority circumstantially proved. *Id.* Implied authority arises where the conduct of the principal, when reasonably interpreted, causes the agent to believe that the principal desires him to act on the principal's behalf. *Id.* For example, implied authority has been shown where a prior course of dealing of a similar nature between the agent and principal from a previous agency relationship has been established. *Id.*

¶ 23 The *Curto* court concluded that Marilee did not have actual authority to act as Charles's agent. It stated that Marilee's signature on the nursing home documents did not confer such authority on her. *Id.* First, the record was devoid of any indication that Charles gave Marilee express authority to make legal decisions on his behalf. *Id.* Further, the terms of the admission contract and the arbitration agreement did not give Marilee authority to act as Charles's agent and Charles did not execute a power of attorney appointing Marilee as his agent for that purpose. *Id.* at 892-93. Second, Pekin Manors failed to demonstrate any implied authority as no evidence demonstrated that Charles was present and directed Marilee to sign the arbitration agreement as his representative or even knew Marilee signed the agreement and agreed/adopted her signature as his own. *Id.* at 893. Thus, the court held that Marilee's signature as a representative did not establish that she had actual authority to sign the arbitration agreement on Charles's behalf. *Id.*

¶ 24 In this case, Thomas did not have express authority to act as Margaret's agent. The record fails to contain any evidence that Margaret signed any type of written agreement, executed a power of attorney granting Thomas this authority, or that a court order provided him with such

authority. Heartland instead argues that Thomas had implied authority to act as Margaret's agent because of his financial activities, such as when he paid their joint bills out of a joint checking account and canceled Margaret's automobile insurance, and gave numerous medical directives.

¶ 25 We find this argument unpersuasive because Heartland is focusing on the actions taken by Thomas, the purported agent, and not the actions of Margaret, the purported principal. We note the trial court also used this reasoning when reaching its ruling. As discussed in *Curto*, we must look at the actions of the purported principal—not the agent. *Id.* at 892. Additionally, the evidence submitted by Heartland does not demonstrate that Margaret was present when Thomas signed the agreements, directed Thomas to sign them, or knew that they were signed. In fact, Heartland does not argue that it witnessed any action by Margaret suggesting an agency relationship. For these reasons, Thomas did not have actual authority, neither express nor implied, to act as Margaret's agent and legally bind her to the Arbitration Agreement.

¶ 26 B. Apparent Authority

¶ 27 Next, the *Curto* court determined whether Marilee had apparent authority to act as Charles's agent. Pekin Manors argued, that since Marilee made a health care decision for Charles to be placed in a nursing home and Charles remained in the nursing home, Charles consented to Marilee's authority to sign the arbitration agreement. *Id.* at 895. "Apparent authority arises when a principal creates a reasonable impression to a third party that the agent has the authority to perform a given act." *Id*. Apparent authority is shown where (1) the principal consented to or knowingly acquiesced in the agent's exercise of authority; (2) based on the actions of the principal and agent, the third party reasonably concluded that the agent had authority to act on the principal's behalf; and (3) the third party justifiably relied on the agent's apparent authority to his detriment. *Id.* "An agent's authority may be presumed by the principal's silence if the

principal *knowingly* allows another to act for him as his agent." (Emphasis added.) *Id.* at 896.

¶ 28 The court noted that Charles never conducted himself in a way that would indicate to Pekin Manors that Marilee was his apparent agent for purposes of the arbitration agreement. *Id.* Again, there was no evidence that Charles was present when Marilee signed the agreement or Charles was even aware or understood Marilee was signing an agreement waiving his legal rights. *Id.* The record contained no words or conduct by Charles that would reasonably indicate such consent. Thus, Pekin Manors failed to establish that Marilee had apparent authority to sign the arbitration agreement on Charles's behalf. The court affirmed the trial court's decision and held that Marilee could not be required to arbitrate Charles's claims against Pekin Manors. *Id.*

¶ 29 In the case at bar, *Curto* also demonstrates that Thomas did not have apparent authority to act as Margaret's agent for the purpose of forgoing her legal rights. Heartland argues, that by the time Thomas brought Margaret to Heartland, he had already authorized neurosurgery, the placement of a feeding tube, a tracheostomy, and transfers between other facilities, demonstrating his apparent authority. Again, Heartland is only focusing on the purported agent's actions, when the purported principal's actions are at issue. The record fails to demonstrate that Margaret conducted herself in a manner that would indicate to Heartland that Thomas was her apparent agent for purposes of the Arbitration Agreement. Heartland failed to show that Margaret was present when Thomas signed the agreement or that Margaret understood or even knew that Thomas was signing an agreement waiving her legal rights. The record also fails to contain any words or conduct by Margaret that would reasonably indicate consent.

¶ 30 As such, Heartland failed to establish by a preponderance of the evidence that Thomas had authority to sign the Arbitration Agreement on Margaret's behalf as Margaret's agent.

¶ 31 C. Surrogate Act

¶ 32 Alternatively, Heartland argues that the trial court's order granting its motion to dismiss with prejudice and compelling arbitration should be affirmed because the execution of the Arbitration Agreement was a "health care decision" that Thomas was authorized to make under the Health Care Surrogate Act (Surrogate Act) (755 ILCS 40/1 *et seq.* (West 2014)). We note that the trial court did not address this argument because it found that Thomas had authority to enter into the Arbitration Agreement as Margaret's actual and apparent agent.

¶ 33 The Surrogate Act applies to patients who lack decisional capacity or who have certain qualifying conditions. 755 ILCS 40/15 (West 2014). The surrogate decision-maker makes medical treatment decisions on behalf of the patient and can only be removed by the patient who no longer lacks decisional capacity, appointment of a guardian, or the patient's death. 755 ILCS 40/15(f) (West 2014). Surrogate decision-makers are identified by the attending physician and prioritize the following statuses in this order: the patient's guardian, the patient's spouse, any adult child of the patient, either parent of the patient, any brother or sister of the patient, any adult grandchild of the patient, a close friend of the patient, the patient's guardian of the estate, and the patient's temporary custodian under the Juvenile Court Act of 1987. 755 ILCS 40/15(a) (West 2014). The surrogate decision-maker has the same right as the patient to receive medical information and medical records and to consent to disclosure. 755 ILCS 40/15(e) (West 2014).

¶ 34 Here, it is undisputed that Thomas was Margaret's surrogate decision-maker under the Surrogate Act as she lacked decisional capacity when she was admitted as a patient at Heartland. The narrow issue is whether Thomas, as Margaret's surrogate decision-maker, had the authority to legally bind Margaret to the terms of the Arbitration Agreement.

¶ 35 Heartland largely relies on *Fiala v. Bickford Senior Living Group, LLC*, 2015 IL App (2d) 141160, to support its position that Thomas, as Margaret's surrogate decision-maker, had

the authority to bind her to the Arbitration Agreement. In *Fiala*, the establishment contract included an arbitration provision that required the patient to arbitrate any claims or disputes arising out of the establishment contract. *Id.* ¶ 29. *Fiala* also involved circumstances where the party that signed the establishment contract was also the patient's health-care power of attorney. *Id.* The court held that the patient's health-care power of attorney may enter into agreements necessary to carry out his or her duties on behalf of the patient. *Id*. ¶ 38. The court went on to hold that "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 court emphasized that the arbitration clause in the case before it was "neither optional nor freestanding." *Id.* Therefore, the agent's status as health-care power of attorney allowed him to bind the patient to the arbitration clause because "it was part of the establishment contract that gained plaintiff admission into defendant's facility." *Id.*

¶ 36 Most notably, the *Fiala* court distinguished the facts before it from those presented in *Curto*. The court stated, in relevant part, as follows:

> [I]n *Curto* *** the court held that a wife lacked the authority to sign an arbitration agreement when admitting her husband to a residential nursing home. In that case, however, there was no evidence that the husband had executed a power of attorney in favor of his wife. [Citation.] Additionally, and in harmony with the persuasive foreign authority discussed above, the arbitration agreement was separate from the contract for admission to the facility. [Citation.] Thus, *Curto* may be understood to hew to the line of cases holding that a separate arbitration agreement is outside the power of the agent exercising the right to make health-care decisions (although the fact that there was no power of attorney

granted in *Curto* also serves to distinguish the case). *Id.* ¶ 46.

¶ 37 We agree with *Fiala* that *Curto* present different facts and we find these distinctions necessitate a different result. As in *Curto*, the evidence before us shows that Margaret never executed any power of attorney in favor of Thomas, the Arbitration Agreement was not a requirement for admittance, and the Arbitration Agreement was an separate, optional agreement.

¶ 38 First, it is undisputed that Margaret did not designate Thomas as any form of power of attorney. Second, even if we assume Thomas had the same authority as the health-care power of attorney in *Fiala*, the Arbitration Agreement was not a requirement for Margaret to be admitted into Heartland. The Admission Agreement contained a provision entitled "Venue Notice," which stated, in relevant part, "*If* You agree to the Voluntary Arbitration Agreement, which is a *separate agreement* from this Admission Agreement, the Voluntary Arbitration Agreement will control. *If*, however, the Voluntary Arbitration Agreement is not signed or it is not enforced for any reason, this Venue Notice section will control." (Emphases added.) This clause demonstrates that the Arbitration Agreement was a separate agreement that was not a requirement for Margaret's admission into Heartland. Therefore, unlike the health-care power of attorney in *Fiala*, it was not necessary for Thomas to sign the Arbitration Agreement and he did not have the authority to do so. Also, the Admission Agreement states that Margaret was admitted into Heartland on August 25, 2015, but Heartland's representative and Thomas did not sign the Admission Agreement or the Arbitration Agreement until August 26, 2015. This further demonstrates that Thomas's execution of the Arbitration Agreement was not a required condition for Margaret's admittance into Heartland, as she was already admitted before Thomas even signed the Arbitration Agreement.

¶ 39 Third, we also distinguish the case at bar from *Fiala* because, as Heartland admits in its

own Admission Agreement, the Arbitration Agreement was a separate and optional agreement from the Admission Agreement. For these reasons, we hold that Thomas, as Margaret's surrogate decision-maker, did not have authority to bind Margaret to the freestanding and non-mandatory Arbitration Agreement. We also note, that although the Arbitration Agreement stated that the parties agreed the Arbitration Agreement was a health-care decision, we find that it as not a health-care decision based on the facts and circumstances before us.

¶ 40 Therefore, Thomas did not have authority to enter into the Arbitration Agreement on Margaret's behalf. Accordingly, Thomas is not required to arbitrate Margaret's claims against Heartland. We reverse the trial court's judgment granting Heartland's motion to dismiss and compelling arbitration and remand for further proceedings.

¶ 41 II. Ormond's Motion to Dismiss

¶ 42 Next, Nelson argues that the trial court erred when it granted Ormond's motion to dismiss with prejudice. Section 2-619 of the Code allows a litigant to obtain an involuntary dismissal of an action or claim based upon certain defects or defenses. See 735 ILCS 5/2-619 (West 2016); *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367 (2003). The statute's purpose is to provide litigants with a method for disposing of issues of law and easily proven issues of fact early in a case, often before discovery has been conducted. See *Van Meter*, 207 Ill. 2d at 367. In a section 2-619 proceeding, the moving party admits the legal sufficiency of the complaint but asserts an affirmative defense or other matter to defeat the nonmoving party's claim. *Id.*

¶ 43 Section 2-619 lists several different grounds for which an involuntary dismissal may be granted. See 735 ILCS 5/2-619(a)(1) to (a)(9) (West 2016). Under subsection (a)(9), the subsection that applies in this case, a defendant may obtain an involuntary dismissal of a claim asserted against him if the claim is barred by other affirmative matter, which avoids the legal

effect of or defeats the claim. *Id.* § 2-619(a)(9). An "affirmative matter" is something in the nature of a defense that negates the cause of action completely. *Van Meter,* 207 Ill. 2d at 367. The defendant has the burden of proving the affirmative matter that would defeat the plaintiff's claim. *In re Estate of Hanley*, 2013 IL App (3d) 110264, ¶ 55. Once the defendant satisfies this burden, the burden then shifts to the plaintiff to show the affirmative matter is either unfounded or requires the resolution of essential, material facts before it is proven. *Id.*

¶ 44 In ruling upon a section 2-619 motion to dismiss, the court must construe all of the pleadings and supporting documents in the light most favorable to the nonmoving party. *Id.* at 367-68. On appeal, a dismissal pursuant to section 2-619 is reviewed *de novo. Id.* at 368. When *de novo* review applies, the appellate court performs the same analysis that the trial court would perform. *Direct Auto Insurance Co. v. Beltran,* 2013 IL App (1st) 121128, ¶ 43.

¶ 45 In this case, Ormond attached the LLC agreement for Heartland to his motion to dismiss. The agreement was entered into on April 7, 2011, by HCR IV Healthcare, LLC, the "sole equity member" of Heartland. Essentially, the "affirmative matter" presented by Ormond was that he was not an owner of Heartland, and therefore, was an improper party. At that point, the burden shifted to Thomas. In response, Thomas provided a printout from the Illinois Department of Public Health website that stated Ormond had an 8.7% ownership interest in Heartland.

¶ 46 Viewing the pleadings and all supporting documents in the light most favorable to Thomas, the nonmoving party, the trial court erred as a matter of law when it granted Ormond's motion to dismiss. Based on the printout provided by Thomas, the "affirmative matter" asserted by Ormond was unfounded or required the resolution of essential, material facts. More specifically, contradictory evidence of record existed as to whether Ormond had an ownership interest in Heartland. Therefore, the trial court erred when it granted Ormond's motion to dismiss

with prejudice. We reverse the trial court's order granting Ormond's motion to dismiss with prejudice and remand for further proceedings.

¶ 47 CONCLUSION

¶ 48 For the foregoing reasons, the judgment of the circuit court of Knox County is reversed and remanded.

¶ 49 Reversed and remanded.