Cite as 2024 Ark. App. 138

# ARKANSAS COURT OF APPEALS

DIVISION II
No. CV-22-400

PINES - PROGRESSIVE ELDERCARE SERVICES, INC., D/B/A THE PINES NURSING AND REHABILITATION CENTER; PROGRESSIVE ELDERCARE SERVICES, INC.; SOUTHERN ADMINISTRATIVE SERVICES, INC.; PROCARE THERAPY SERVICES, LLC; CAREPLUS STAFFING SERVICES, LLC; PROFESSIONAL NURSING SOLUTIONS, LLC; OHI ASSET (AR) HOT SPRINGS, LLC; MASTERTEN, LLC; ANGELA D. MARLAR, INDIVIDUALLY AND IN HER CAPACITY AS ADMINISTRATOR AND PRESIDENT OF THE PINES NURSING AND REHABILITATION CENTER; JOHN DOES 1 THROUGH 5, UNKNOWN DEFENDANTS; AND JOHN DOE INSURANCE COMPANIES A–D, UNKNOWN DEFENDANTS

APPELLANTS

V.

LAURA CARNAHAN, AS ADMINISTRATRIX OF THE ESTATE OF MARY EVELYN RHEA, DECEASED, AND ON BEHALF OF THE WRONGFUL DEATH BENEFICIARIES OF MARY EVELYN RHEA

APPELLEE

Opinion Delivered February 28, 2024

APPEAL FROM THE GARLAND COUNTY CIRCUIT COURT
[NO. 26CV-20-380]

HONORABLE MARCIA R. HEARNSBERGER, JUDGE

AFFIRMED

**ROBERT J. GLADWIN, Judge**

This is an interlocutory appeal from an order of the Garland County Circuit Court denying a motion to compel arbitration. Appellants are Pines - Progressive Eldercare Services, Inc., d/b/a The Pines Nursing and Rehabilitation Center; Progressive Eldercare Services, Inc.; Southern Administrative Services, LLC; ProCare Therapy Services, LLC; CarePlus Staffing Services, LLC; Professional Nursing Solutions, LLC; OHI Asset (AR) Hot Springs, LLC; MasterTen, LLC; Angela D. Marlar, individually and in her capacity as administrator and president of The Pines Nursing and Rehabilitation Center; John Does 1 through 5, unknown defendants; and John Doe Insurance Companies A–D, unknown defendants. The appellee is Laura Carnahan, as administratrix of the estate of Mary Evelyn Rhea, deceased, and on behalf of the wrongful death beneficiaries of Mary Evelyn Rhea ("Carnahan"). Appellants contend that the circuit court erred in denying their motion to compel arbitration despite the existence of a valid and enforceable arbitration agreement. We affirm.

## I. *Background Facts*

On October 24, 2018, Mary Evelyn Rhea ("Rhea") was admitted to the Pines - Progressive Eldercare Services, Inc., a nursing home (the "Facility") by one of her daughters, Mary Courtney (otherwise known and referred to herein as "Beth"). In connection with Rhea's admission, Beth signed multiple documents for Rhea, including an arbitration agreement. When Beth arrived at the Facility prior to Rhea's transfer, she presented the Facility a durable power of attorney ("POA") for health care dated June 19, 2018. The healthcare POA listed Stephen Rhea ("Stephen") as Rhea's healthcare agent, and Beth was

listed as an alternate agent in the event Stephen was "unavailable, unable or unwilling" to make healthcare decisions for Rhea. Beth signed the arbitration agreement and checked the box marked "Power of Attorney" next to her signature.

Beth stated that she informed the Facility representative, Pam Tabor, that Stephen was the primary healthcare POA, that he lived less than a mile away, and that he was available to come to the Facility later that afternoon to sign any healthcare paperwork as needed. Beth recalled in her deposition testimony that Tabor stated she could sign the admissions paperwork, including the arbitration agreement, because the healthcare POA authorized her to do so. Beth recalls that she made phone calls to two of her sisters—to further consult them regarding the admissions paperwork—but she was unable to reach either one. Stephen arrived at the Facility later that afternoon, and the Facility provided him copies of all the papers that Beth had signed; however, he was not asked to sign any of the documents.

When the discussion moved to financial matters of payment for Rhea's admission to the Facility, Beth told the Facility's financial officer that her sister, Sue Bennett ("Sue"), had authority over Rhea's financial matters. After Rhea was transferred to the Facility, Sue arrived and provided the Facility with a copy of the statutory POA—dated October 22, 2018—which granted Sue the authority as Rhea's agent over a list of subjects, including "claims and litigation." The statutory POA also granted Sue the authority to "authorize another person to exercise the authority granted under this power of attorney." Sue testified that after arriving at the Facility, she spent a couple of hours going over financial paperwork that she

was required to sign; however, the Facility never presented Sue the arbitration agreement for signature.

Rhea was a resident of the Facility from October 24, 2018, through March 10, 2019, and later passed away on March 18, 2019. On March 5, 2020, Carnahan, as administratrix of the Rhea's estate and on behalf of Rhea's wrongful death beneficiaries, filed a complaint against the appellants, including the Facility, asserting claims for negligence and medical malpractice for the injuries to, and wrongful death of, Rhea. The complaint alleged that Rhea sustained numerous injuries, which included the following: infections; pressure sores, including a Stage IV coccyx sore with purulent drainage; malnourishment; severe pain and suffering; and an untimely death. The appellants filed answers asserting the defense of arbitration. On May 7, 2021, the Facility filed its motion to compel arbitration. Carnahan opposed the arbitration demand, denying that the arbitration agreement was binding against the Rhea's estate.

In its reply, the Facility argued that the arbitration agreement was valid and enforceable because Beth executed the agreement under the assumption that she had the authority to do so pursuant to her appointment as an alternate agent under the healthcare POA, and furthermore, that Sue subsequently ratified Beth's execution of the arbitration agreement.

On June 24, 2021, the Facility requested a thirty-minute hearing on the briefed issues regarding the motion to compel arbitration. In response, the circuit court held a hearing on September 20, and the court took the motion under advisement. On January 21, 2022, the

circuit court issued a letter opinion finding that the Facility failed to prove that a valid arbitration agreement exists. In its order denying the motion to compel arbitration, the court stated as follows:

> 1. The Court finds that Defendants failed to meet their burden to prove that a valid arbitration agreement exists between Plaintiff and Defendants. Defendants failed to show that Beth Courtney had authority to bind Mary Evelyn Rhea to the arbitration agreement. There is no evidence before the Court that Sue Bennett granted her sister, Beth Courtney, such authority or that Beth Courtney believed she was acting pursuant to an assignment of Sue Bennett's powers when she signed the arbitration agreement.
>
> 2. The Court cannot presume agency. Defendant failed to establish the existence of an agency relationship between Beth Courtney and Mary Evelyn Rhea when Beth Courtney signed the arbitration agreement. It is well established Defendant knew Sue Bennett and not Beth Courtney had Power of Attorney to act on Mary Evelyn Rhea's behalf in a matter such as the arbitration agreement, yet Defendant did not present the arbitration agreement for her to sign. Sue Bennett did not have knowledge of her sister's unauthorized act. Therefore, her silence regarding her sister's act or acceptance of benefits, if any, from that act cannot serve to ratify it. Because no valid agreement for arbitration exists, the scope of the document is irrelevant.

The circuit court entered the order denying the Facility's motion to compel arbitration on March 1, 2022. The Facility filed a timely notice of appeal, and this appeal followed.

## II. *Standard of Review*

An order denying a motion to compel arbitration is immediately appealable pursuant to Arkansas Rule of Appellate Procedure–Civil 2(a)(12) (2023). We review a circuit court's denial of a motion to compel arbitration de novo on the record. *Courtyard Gardens Health & Rehab., LLC v. Arnold*, 2016 Ark. 62, 485 S.W.3d 669. Arbitration is simply a matter of contract between parties. *Hickory Heights Health & Rehab, LLC v. Cook*, 2018 Ark. App. 409,

557 S.W.3d 286. Whether a dispute should be submitted to arbitration is a matter of contract construction, and we look to the language of the contract that contains the agreement to arbitrate and apply state-law principles. *Id.* at 5, 557 S.W.3d at 290. The same rules of construction and interpretation apply to arbitration agreements as apply to agreements generally; thus, we will seek to give effect to the intent of the parties as evidenced by the arbitration agreement itself. *Id.* The construction and legal effect of an agreement to arbitrate are to be determined by this court as a matter of law. *Id.*

III. *Points on Appeal*

The Facility argues the following on appeal: (1) the circuit court erred in finding no valid and enforceable arbitration agreement exists; and alternatively, (2) the circuit court erred by not holding a jury trial on disputed issues of fact as required by the Federal Arbitration Act, 9 U.S.C. §§ 1–16 (the "FAA").

IV. *Discussion*

When a court is asked to compel arbitration, it is limited to deciding two threshold questions: (1) whether there is a valid agreement to arbitrate between the parties, and (2) if such an agreement exists, whether the dispute falls within its scope. *Asset Acceptance, LLC v. Newby*, 2014 Ark. 280, 437 S.W.3d 119. The threshold issue—and the one that is dispositive in this case—is whether there was a valid arbitration agreement.

The essential elements for an enforceable arbitration agreement are (1) competent parties, (2) subject matter, (3) legal consideration, (4) mutual agreement, and (5) mutual obligation. *Bank of the Ozarks, Inc. v. Walker*, 2014 Ark. 223, 434 S.W.3d 357. Thus, in

order to have a valid agreement to arbitrate, there must have been mutual agreement with notice as to the terms and subsequent assent. *Id.* The Facility, as the proponent of the arbitration agreement, has the burden of proving these essential elements. *See Robinson Nursing & Rehab. Ctr., LLC v. Phillips*, 2019 Ark. 305, 586 S.W.3d 624.

A. Ratification

First, the Facility maintains that the circuit court erred in denying its motion to compel arbitration because Sue ratified Beth's execution of the arbitration agreement. Specifically, the Facility does not dispute the fact that Beth lacked the authority to agree to the arbitration agreement on behalf of Rhea, but that the actions, or lack thereof, of Sue—who had authority pursuant to the statutory POA to bind Rhea to the agreement—ratified Beth's execution of the arbitration agreement, making it binding on Rhea's estate. The Facility correctly acknowledges that Beth's designation as alternate agent on Rhea's healthcare POA failed to grant her the authority to sign the arbitration agreement. *See Courtyard Gardens Health & Rehab., LLC v. Williamson*, 2016 Ark. App. 606, at 3, 509 S.W.3d 685, 688 (holding that power of attorney that included authority to make healthcare decisions did not include authority to agree to arbitration where the power of attorney did not authorize the agent to make decisions regarding "claims and litigation"). Accordingly, because Beth lacked the authority to bind Rhea to the arbitration agreement, the question

here is whether Sue subsequently ratified Beth's unauthorized act of executing the agreement on Rhea's behalf, thereby creating an enforceable contract.

The supreme court has said that "[r]atification is a doctrine of agency . . . [that] refers to the express or implied adoption and confirmation by one person of an act or contract performed or entered into in his behalf by another without authority." *Brady v. Bryant*, 319 Ark. 712, 715, 894 S.W.2d 144, 146 (1995). Ratification may be implied rather than express, and implied ratification may be inferred from the acts and words of the principal. *Progressive Eldercare Servs. - Morrilton, Inc. v. Taylor*, 2021 Ark. App. 379. The doctrine of ratification, however, has no application if there was no agency relationship. *Id.* As our supreme court explained as far back as 1930, "[a] contract made by one who is not an agent and does not claim to act as an agent cannot be ratified. To permit ratification under such circumstances would be to permit a person to whom an offer was not made to force a contract upon a party who did not mean to deal with him." *Runyan v. Cmty. Fund of Little Rock & N. Little Rock*, 182 Ark. 441, 445, 31 S.W.2d 743, 744 (1930).

In *General Contract Purchase Corp. v. Row*, the court stated:

> It is a well-established rule of law that if one, not assuming to act for himself, does an act for or in the name of another upon an assumption of authority to act as the agent of the latter, even though without any precedent authority whatever, if the person in whose name the act was performed subsequently ratifies or adopts what has been so done, the ratification relates back and supplies original authority to do the act. In such cases, the principal, whether a corporation or an individual, is bound to the same extent as if the act had been done in the first instance by his previous authority; this is true whether the act is detrimental to the principal or to his advantage, whether it sounds in contract or tort, or whether the ratification is express or implied.

208 Ark. 951, 957, 188 S.W.2d 507, 510 (1945) (quoting 2 Am. Jur. *Agency* § 166 (1936)).

The Facility contends that because these conditions are met, ratification applies and provided original authority for Beth to execute the arbitration agreement. We disagree.

First, the record does not support the assertion that Beth thought she was acting under an assumption of authority on behalf of Rhea. Is it undisputed that Beth presented the Facility with a healthcare POA, which designated her as the alternate healthcare agent. Beth testified that she informed the Facility representative that Stephen, the primary agent under the healthcare POA, would be available to sign paperwork later that afternoon. The record reflects, however, that the Facility encouraged Beth to sign the paperwork, indicating that the healthcare POA authorized her to do so.

Next, the Facility maintains that an agency relationship—as required for the doctrine of ratification to apply—existed between Beth and Rhea pursuant to the healthcare POA that designated Beth as an alternate agent. While some agency relationship might have existed between Beth and Rhea, it was not that which was required to bind Rhea to "claims and litigation." Further, there is no merit to the Facility's argument that Sue "could have given" Beth permission and authority to execute the arbitration agreement before the fact, and "if she had," Beth's execution of the agreement would be enforceable as a valid grant of Sue's authority under the statutory POA. The Facility presented no evidence that Sue bestowed upon Beth the authority to execute the agreement on her behalf. Because this argument is mere speculation of what "could have" happened with no factual support, it must fail.

Finally, despite the Facility's arguments to the contrary, Sue's actions—or lack thereof—do not support a finding of ratification because the evidence does not indicate that Sue had full knowledge of what Beth signed while at the nursing home. It is well established that "one relying upon ratification of an unauthorized act of an agent must show that at the time of ratification the principal had full knowledge of all the material facts connected with the transaction." *Runyan*, 182 Ark. at 444, 31 S.W.2d at 744.

The record does not reflect when and how Sue found out that Beth had agreed to waive Rhea's right to a jury trial for any claims against the Facility. The following testimony at Sue's deposition took place concerning the paperwork Beth signed:

ATTORNEY: Did Beth express any concerns to you about anything that was in the paperwork that she had signed on the 24th?

SUE: Not that I really recall. If she did, it was intermixed in with a concern about everything else. I mean, it was nothing that I remember specifically. I'm not saying she didn't. I don't—I don't remember one thing specific. I just remember, you know, we were all pretty low that day.

ATTORNEY: Sure. Just make sure I understand, Beth did not express any specific concerns that you remember about the admissions paperwork she signed?

SUE: Not that – not at that point. I mean, later on she – we talked about this form, but not at that point.

ATTORNEY: Later on like after – like recently maybe?

SUE: Yeah. I don't want to say we never talked about it.

Therefore, while there may have been communications between the sisters as to what was signed after the fact, there is no evidence that Beth advised Sue of the arbitration agreement.

Citing *Arnold v. All American Assurance Co.*, 255 Ark. 275, 499 S.W.2d 861 (1973), the Facility maintains that failure to object may constitute acquiescence or ratification, if from the facts and circumstances adduced in evidence, it can be said that the principal must have known or had knowledge of facts to put him on notice, of the agent's unauthorized actions. Here, however, we simply have no evidence before this court to indicate that Sue either knew about or read the arbitration agreement within ten days of it being signed in order to have repudiated the agreement in accordance with its terms. Additionally, given the fact that Sue went to the Facility later in the afternoon on the day Rhea was admitted and signed financial documents for a couple of hours, it is reasonable that Sue believed she was presented with all documentation that required her signature.

Moreover, Sue's passive acceptance of Rhea's care at the Facility, thereby "retaining the benefit of the transaction," is not sufficient to constitute implied ratification without evidence of knowledge on Sue's part. Accordingly, we agree with the circuit court that Sue's silence regarding Beth's unauthorized act or acceptance of benefits, if any, does not constitute ratification. Because there was no valid and enforceable arbitration agreement, we affirm the circuit court's order denying the motion to compel arbitration.

B. Jury Trial

In the alternative, the Facility maintains that we should reverse and remand to the circuit court with instructions to conduct a jury trial. Specifically, the Facility argues that because material questions of fact regarding the making of the arbitration agreement are in question, this court must remand for a trial on the issue.

We recently addressed the same argument in *Hot Springs Nursing & Rehabilitation A Waters Community, LLC v. Hooker*, 2024 Ark. App. 80, ___ S.W.3d ___, ___, and held that the appellant waived the argument on appeal because neither party requested that the circuit court hold a jury trial on the motion. Here, neither party asked the circuit court to hold a jury trial on the Facility's motion to compel arbitration; thus, we find that the argument is precluded on appeal because it was not first brought to the attention of the circuit court. *See, e.g.*, *Schnick v. Russell*, 2022 Ark. App. 212, 645 S.W.3d 345.

However, even if the Facility had preserved the argument for appeal, the FAA permits only the "party alleged to be in default" the right to demand a jury trial on a petition to compel arbitration. *See* 9 U.S.C. § 4. Section 4 of the FAA states as follows:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition . . . for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. . . . If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default . . . the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may . . . on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury . . . .

Here, the "party in default" under the FAA is Carnahan as administratrix of Rhea's estate. Carnahan made no such demand for a jury trial on the motion to compel arbitration. Thus, in accordance with the FAA, the circuit court properly proceeded on the merits of the motion.

## V. *Conclusion*

For the above-stated reasons, we affirm the circuit court's order denying the Facility's motion to compel arbitration.

Affirmed.

GRUBER and BARRETT, JJ., agree.

*Conner & Winters, LLP*, by: *Vicki Bronson* and *Emily C. Mizell*; *Wright, Lindsey & Jennings LLP*, by: *Jeffrey L. Singleton* and *Quinten J. Whiteside*; and *Kutak Rock LLP*, by: *Mark Dossett*, *Jeff Fletcher*, and *Caleb S. Sugg*, for appellants.

*Appellate Solutions, PLLC*, by: *Deborah Truby Riordan*; *Law Offices of Travis Berry*, by: *Travis R. Berry*; and *Trammell Piazza Law Firm, P.L.L.C.*, by: *Melody H. Piazza*, for appellee.