2011 WL 9976440 (Fla.Cir.Ct.) (Trial Motion, Memorandum and Affidavit)
Circuit Court of Florida.
Sarasota County

Isabella E. BICKEL, by and through Beth Ann Wasdin, Attorney-in-Fact, Plaintiff,
v.
Brea SARASOTA, LLC; Emeritus Corporation; and Jill L.chapman
(as to Emeritus At Sarasota f/k/a Gardens At Sarasota), Defendants.

No. 2010CA010940.
April 15, 2011.

Memorandum of Law in Opposition to Defendants' Motion to Compel Arbitration and Stay Discovery

Carl R. Wilander, Esquire, Florida Bar No. 0048239, Wilkes & McHugh, P.A., 1 North Dale Mabry, Ste. 800, Tampa, FL 33609, (813) 873-0026/fax (813) 286-8820, Attorney for Plaintiff.

Plaintiff, ISABELLA E. BICKEL, by and through BETH ANN WASDIN, Attorney-in-Fact, and by and through undersigned counsel, files this Memorandum of Law in Opposition to Defendants' Motion to Compel Arbitration and Stay Discovery. This matter is scheduled for hearing on **Monday, April 18, 2011 at 3:45 p.m.** before The Honorable Andrew D. Owens, Jr. In support thereof, Plaintiff states as follows:

FACTUAL AND PROCEDURAL BACKGROUND

On April 15, 2009, Isabella E. Bickel was admitted to Emeritus at Sarasota, an assisted living facility. The admission was one of three admissions by Mrs. Bickel to Emeritus of Sarasota during 2009. Mrs. Bickel's last discharge from Emeritus at Sarasota was on December 28. Beth Ann Wasdin, Mrs. Bickel's daughter, signed an Agreement to Resolve Disputes by Binding Arbitration [1] on April 15, 2009. Previously, on October 19, 2007, Beth Ann Wasdin was appointed Attorney in Fact pursuant to a General Durable Power of Attorney. [2]

Plaintiff has alleged that while Isabella E. Bickel was residing at the assisted living facility, the acts and omissions of Defendants constituted violations of her residents' rights, pursuant to Chapter 429, Florida Statutes. Accordingly, Plaintiff filed its Complaint on October 19, 2010, seeking damages for negligence. Defendants responded by filing Defendants' Motion to Compel Arbitration and Stay Discovery on November 15, 2010.

It is in this setting that the Defendants' instant Motion comes before this Court for resolution.

SUMMARY OF THE ARGUMENT

Plaintiff, Isabella E. Bickel did not personally sign the arbitration agreement, and Defendants have failed to meet their burden of proving that Beth Ann Wasdin, the signatory to the Agreement to Resolve Disputes by Binding Arbitration, had the requisite authority to bind Mrs. Bickel to arbitration. None of the documents proffered by the Defendants purports to give Beth Ann Wasdin the authority to waive her mother's constitutional rights to access to courts, trial by jury, and due process, by binding her to arbitration.

On January 18, 2008, the Second District Court of Appeal issued its decision in *McKibbin v. Alterra Healthcare Corp.*, 977 So.2d 612 (Fla. 2d DCA 2008). In McKibbin, the Court considered whether a durable power of attorney gave a son the authority to enter into an arbitration agreement with a nursing home on behalf of his mother. *Id.* at 613. **The Court held that powers of attorney must be strictly construed and include only those powers specified.** *Id;* citing to *Kotsch v. Kotsch*, 608 So.2d 879, 880 (Fla. 2d DCA 1992) (emphasis added). The Court found that the power of attorney did not give Mr. McKibbin the authority to waive his mother's constitutional rights by binding his mother to arbitration. See Id.

It is black-letter law that the party seeking to enforce the agreement must prove that the signatory had the authority to bind the nonsignatory. The Defendants have failed to meet this burden. Furthermore, Plaintiff has shown that the arbitration agreement is invalid and unenforceable due to procedural and substantive unconscionability. Finally, the Defendants' arbitration agreement violates public policy, as it imposes half of the arbitrators fees on the Plaintiff, and thereby effectively denies Plaintiff access to the Courts.

ARGUMENT

I. THE DEFENDANTS' BURDENS

On a motion to compel arbitration, the burden is on the moving party to establish that an enforceable written agreement to arbitrate exists between the parties. *Shearson, Lehman, Hutton, Inc. v. Lifshutz*, 595 So.2d 996 (Fla. 4th DCA 1992). The Florida Supreme Court has held that "there are three elements for courts to consider in ruling on a motion to compel arbitration of a given dispute: (1) whether a valid agreement to arbitrate exists; (2) whether an arbitration issue exists; and (3) whether the right to arbitration has been waived." *Seifert v. U.S. Home Corp.*, 750 So.2d 633, 636 (Fla. 1999). The elements of a contract are: competent parties, a lawful subject matter, valid consideration, and agreement of the minds. *State v. Lee*, 183 So. 782, 795 (Fla. 1938).

II. THE ARBITRATION AGREEMENT IS AN UNENFORCEABLE AGREEMENT

The Second District Court of Appeal of Florida has addressed the issue as to whether a durable power of attorney who executes an arbitration agreement has authority to enter into the arbitration clause. *See Carrington Place of St. Pete, LLC v. Estate of Milo ex rel. Brito*, 2009 WL 763607 (Fla. App. 2 Dist. March 25, 2009). The Second District noted in their opinion that the power of attorney that was executed did not unambiguously make a broad, general grant of authority. The Court referenced *Estate of McKibbin v. Alterra Health Corp. (In re Estate of McKibbin)*, 977 So. 2d 612 (Fla. 2d DCA), review denied, 987 So. 2d 79 (Fla. 2008), stating "where nothing in a power of attorney gives an attorney-in-fact legal authority to enter into an arbitration agreement on a person's behalf, a trial court is incorrect to grant a nursing home's motion to compel arbitration based on an admission agreement entered into by the attorney-in-fact." The above cited cases involve arbitration agreements that are executed by a power of attorney but found to be unenforceable.

In the instant case, the Durable Power of Attorney that was executed on April 15, 2004, did not unambiguously make a broad, general grant of authority, nor did it allow Beth Ann Wasdin to waive Isabella E. Bickel's constitutional rights. Therefore, the arbitration agreement cannot be enforceable.

III. THE DEFENDANTS HAVE FAILED TO PROVE THAT A VALID AND ENFORCEABLE ARBITRATION AGREEMENT EXISTS BECAUSE THE ARBITRATION AGREEMENT IS UNCONSCIONABLE.

A. Procedural Unconscionability

Florida courts may also properly decline to enforce a contract on the ground that it is unconscionable; however, to support a determination of unconscionability, the court must find that the contract is both procedurally and substantively unconscionable.

Powertel, Inc. v. Bexley, 743 So.2d 570, 574 (Fla. 1st DCA 1999). This district assesses procedural unconscionability and substantive unconscionability independently. *Bland v. Health Care and Retirement Corp. of America*, 927 So.2d 252, 257 (Fla. 2d DCA 2006).

Procedural unconscionability "relates to the manner in which a contract is made and involves consideration of issues such as the bargaining power of the parties and their ability to know and understand the disputed contract terms. *Woebse v. Health Care and Retirement Corporation of America*, 977 So.2d 630 (Fla. 2d DCA 2008). The Defendants, who occupy a superior bargaining position relative to Isabella E. Bickel, drafted the arbitration agreement in the instant case. Summaries of relevant portions of the depositions of Kim Nadwodny (Community Relations Director at the facility), Jill Chapman (Executive Director at the facility) and Beth Ann Wasdin (daughter of Isabella E Bickel), which demonstrate procedural unconscionability, are provided below.

Beth Ann Wasdin testified that she did not receive any admission paperwork prior to her mother's admission; instead, when she brought her mother to the facility to be admitted, she (Beth Ann Wasdin) signed the paperwork as soon as it was provided to her.[3] She testified that when she and her mother arrived at the facility they were told that there was only one Medicaid bed left and that they needed to jump on it before somebody else got it; in the meantime, her mother had wet her pants and she (Beth Ann Wasdin) needed to deal with her mother's embarrassment.[4] She testified that because there was only one bed left, she signed the paperwork then and there and wrote out a check to cover her mother's admission.[5] She testified that during the signing process, the facility representative turned the pages and she (Beth Ann Wasdin) initialed and signed each page, and printed her mother's name where necessary; that she did not remember the words "Arbitration Agreement," and that form was not brought to her attention; that she felt like she had to sign the paperwork then and there to secure the bed for her mother; and that no one told her that by signing the paperwork, she was waiving her mother's constitutional right to a trial or that her mother's access to the courts was being restricted.[6] Finally, she testified that because everything was so rushed, she did not read each and every admission document.[7]

In contrast, Kim Nadwodny testified that she recalled Mrs. Bickel, but not Beth Ann Wasdin. Significantly, Ms. Nadwodny testified that she did not remember anything about the April 15, 2009, admission process; that the pre-filled handwriting throughout the admissions documents was hers; that the normal process was that she would fill out the paperwork and give it to the family to take home.[8] She also testified that she would explain the arbitration clause to someone signing the paperwork -- if the person asked her to explain it to him or her[9]. Of course, since she does not recall Ms. Wasdin, Ms. Nadwodny could not testify as to whether anything was explained to Ms. Wasdin.

Jill Chapman testified that she recalled Beth Ann Wasdin, but that she did not recall anything about the admissions process involving Ms. Wasdin or her mother.[10] Ms. Chapman admitted that she signed the paperwork on behalf of the facility, which had been pre-filled out by Ms. Nadwodny.[11] In stark contrast to Ms. Wasdin's specific recollection as to how the agreement was signed in this case, Ms. Chapman testified that generally the facility's procedure was to have a family take the paperwork home after the facility representative described the paperwork. Furthermore, she testified that when the family brought it back, the facility representative would make sure everything was filled in and signed and answer any questions the family might have.[12] Here, based on Ms. Wasdin's testimony the facility's general procedures for admission did not occur, and given the fact that Ms. Wasdin specifically recalls the events her testimony bears more weight.

The facts and circumstances of this case plainly support a finding that the arbitration agreement was entered into in a procedurally unconscionable manner.

B. Substantive Unconscionability

The arbitration agreement that the Defendants seek to enforce restricts the statutory rights afforded to Mrs. Bickel under a remedial legislative act -- the Assisted Living Facilities Act, Chapter 429 (hereafter the "Act"), and is therefore unenforceable. In considering whether the arbitration agreement is substantively unconscionable, this Court should focus on the four corners of the instrument, and whether, by its terms, the arbitration agreement requires Mrs. Bickel to give up statutory rights and remedies.

The impact of the arbitration agreement, if enforced, is to defeat the remedial purpose of the Act, as it strips Mrs. Bickel of her rights to appeal. This limitation seriously curtails the rights and remedies of Mrs. Bickel under the Act, and renders the arbitration agreement unenforceable.

The arbitration agreement in the instant case expressly provides "...any other dispute involving acts and omissions that cause damage or injury...shall be resolved exclusively by binding arbitration and not by lawsuit or resort to the judicial process..." [13] The agreement abrogates an important statutory remedy that the legislature specifically intended to provide the resident plaintiff. Additionally, the arbitration agreement is substantively unconscionable to Isabella E. Bickel regarding the following: "The arbitrator's fee shall be shared equally by the Parties. Each party shall be responsible for its own legal fees." [14]

The fees associated with paying the Arbitrators in this case will be considerable. A conservative estimate of the Arbitrators' fees, evidenced by bills from a recent arbitration between the firms representing the parties in this case, places this amount in excess of $80,000.00 dollars. [15] Defendants seek to hold Plaintiff responsible for half of these fees. If this case were to proceed to Court, the only monies Plaintiff would be required to pay would be the initial filing fee of $400.00. When compared to the cost of a filing fee to initiate a civil action, the amount of fees that would be allocated to Plaintiff for the arbitration is astounding.

To require Plaintiff to pay the fees of the arbitrators is in effect a denial of Plaintiff's right to bring this action, as Plaintiff is not able to pay the substantial amount to the arbitrators. This allocation of fees effectively eviscerates the Plaintiff's access to courts.

Surely, absolving a resident's right to effectively vindicate her cause of action based on the amount of fees that must be expended in this forum is precisely the type of unjust result that is covered by substantive unconscionability. "Substantive unconscionability focuses on the actual agreement and whether the terms are unreasonable and unfair." *Palm Beach Motor Cars Ltd., Inc. v. Jeffries*, 885 So.2d 990, 992 (Fla. 4th DCA 2004). "A substantively unconscionable contract is one that 'no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other."' *Bland v. Healthcare*, 927 So.2d 252, 256 (Fla. 2d DCA 2006) (*citing Belcher v. Kier*, 558 So.2d 1039, 1040 (Fla. 2d DCA 1990). It is difficult to imagine a resident, being adequately apprised of the amount they would have to pay in order to arbitrate a cause of action versus the costs of filing an action in court, would consent to the Agreement.

In *Romano v. Manor Care, Inc.*, 861 So.2d 59 (Fla. 4th DCA 2003), the Fourth District Court of Appeals held that a nursing home arbitration agreement was unenforceable because it failed to provide adequate mechanisms for the vindication of a resident's statutory rights. Id. at 63. The Court took issue with the fact that the agreement "specifically deprive [d] the resident of remedies that the legislature felt were important to the reduction of **elder abuse** in nursing homes." Id. In particular, the agreement prohibited punitive damages and an award of attorney's fees to the successful resident as was provided by the legislature. An allocation of arbitrator's fees has the same effect on a nursing home resident's remedy as the Romano prohibitions. In other words, it deprives a nursing home resident from pursuing any claim against the nursing home because of the cost associated with the arbitration according to the terms. In fact, this Court instructed that the prohibition of awarding attorney's fees to the successful resident took "away any effective enforcement of the statutory rights of the resident." Id. This Court explained:

> Under the arbitration agreement, **in order to vindicate her rights, she would have to pay for an attorney herself, the costs of which may prevent her from pursuing a rightful claim.** Because the arbitration agreement fails to allow the arbiter to award either attorney's fees or punitive damages, it does not permit the nursing home resident to vindicate her statutory rights. Therefore, the agreement is unenforceable.

Id. (emphasis added). These limitations in statutory rights were found to render the agreement a contract of "egregious substantive unconscionability." Id. at 64. The same holds true for an allocation of arbitrator fees to the nursing home resident.

Accordingly, Plaintiff respectfully requests that this Court find that the arbitration agreement is substantively unconscionable.

V. THE ARBITRATION AGREEMENT'S REMEDIAL LIMITATIONS ARE CONTRARY TO PUBLIC POLICY

The arbitration agreement contains provisions, which are void as against public policy. The right to appeal is limited. The statutory right limited by the arbitration agreement is derived

from a remedial legislative act -- the Assisted Living Facilities Act, Chapter 429. A remedial statute is one which confers or changes a remedy. *Campus Communications, Inc. v. Earnhardt,* 821 So.2d 388 (Fla. 5th DCA 2002). The Act is remedial. *Knowles v. Beverly Enterprises-Florida, Inc.,* 898 So.2d 1 (Fla. 2004). The "Residents Rights" portions of the Act were enacted as a legislative response to widespread **elder abuse**. *Romano v. Manor Care,* 861 So.2d 59, 62-63 (Fla. 4th DCA 2003). Because the rights abrogated by the arbitration agreement are based on a remedial statute, which is a declaration of public policy, the imposition of the fees of the arbitration panel on the estate and the denial of the right to appeal the arbitration panel's decision renders the Defendants' Arbitration Agreement void as against public policy.

WHEREFORE, Plaintiff respectfully requests that this Court deny Defendants' Motion to Compel Arbitration and Stay Discovery.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been sent by [ ] Hand Delivery [ ] Facsimile [ ] U.S. Mail [X] Federal Express to: Kirsten Ullman, Esquire, and Nicholas P. Dareneau, Esquire, Lewis, Brisbois, Bisgaard & Smith, LLP, 3812 Coconut Palm Drive, Suite 200, Tampa, FL 33619, this 14th day of April, 2011.

Footnotes

1 Exhibit 1, Agreement to Resolve Disputes by Binding Arbitration, April 15, 2009
2 Exhibit 2, General Durable Power of Attorney, October 19, 2007
3 Exhibit 5, Wasdin depo, p 13, lines 8-19
4 Exhibit 5, Wasdin depo., 22, lines 4-9; pp. 29-30, lines 23-5; pp. 30-31, lines 19-4
5 Exhibit 5, Wasdin depo, p 32, lines 5-15
6 Exhibit 5, Wasdin depo pp. 36-38, lines 22-16; pp. 39-40, lines 18-19
7 Exhibit 5, Wasdin depo, 21, lines 4-6
8 Exhibit 3, Nadwodny depo, pp. 14-15, lines 12-17
9 Exhibit 3, Nadwodny depo, p. 19, lines 2-4
10 Exhibit 4, Chapman depo, pp. 37-38, lines 19-22
11 Exhibit 4, Chapman depo, p. 58, lines 16-20
12 Exhibit 4, Chapman depo, p. 54, lines 1-9
13 Exhibit 1, Agreement to Resolve Disputes by Binding Arbitration, para. 2, April 15, 2009
14 Exhibit 1, Agreement to Resolve Disputes by Binding Arbitration, para. 3, April 15, 2009
15 Exhibit 6, Arbitration Invoices