

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JILL DOE, AS EXECUTRIX FOR
THE ESTATE OF JANE DOE

Plaintiff-Appellant

-VS-

CANTON REGENCY, ET AL.

Defendants-Appellees

JUDGES:

Hon. Julie A. Edwards, P.J.

Hon. Sheila G. Farmer, J.

Hon. John W. Wise, J.

Case No. 2010CA00095

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Court of Common Pleas,
Case No. 2009CV02757

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

January 10, 2011

APPEARANCES:

For Plaintiff-Appellant

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Eighth Floor
Canton, OH 44702

For Defendants-Appellees

ELIZABETH N. DAVIS
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Farmer, J.

{¶1} Jane Doe resided at the Canton Regency from September 2005 to November 2008. On July 15, 2009, Jane Doe filed a complaint, pertinent to this appeal, against appellee, Capital Senior Living ILM-B, Inc., dba Canton Regency Health Care Center, claiming it was negligent in failing to enforce its policies regarding unwanted visitors and as a result, she was injured and her rights under the Nursing Home Bill of Rights had been violated. Jane Doe sought punitive damages. An amended complaint was filed on September 28, 2009.

{¶2} On October 9, 2009, appellee filed a motion to dismiss, or in the alternative, motion to stay proceedings and compel arbitration based on an agreement between the parties titled "Limitation of Liability/Arbitration Agreement."

{¶3} Jane Doe passed away on January 11, 2010. On February 5, 2010, appellant, Jill Doe, Executrix for the Estate of Jane Doe, was substituted as plaintiff.

{¶4} By judgment entry filed March 26, 2010, the trial court denied appellee's motion to dismiss and granted its motion to stay proceedings and compel arbitration.

{¶5} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

{¶6} "THE TRIAL COURT ERRED AS A MATTER OF LAW IN HOLDING THAT THE SUBJECT LIMITATION OF LIABILITY/ARBITRATION AGREEMENT IS ENFORCEABLE BECAUSE NO CONSIDERATION WAS GIVEN BY CANTON REGENCY."

I

{¶7} Appellant claims the trial court erred in finding the Limitation of Liability/Arbitration Agreement was enforceable as it was supported by consideration. We disagree.

{¶8} "The issue of whether a controversy is arbitrable under an arbitration provision of a contract is a question of law for the court to decide upon an examination of the contract." *Gaffney v. Powell* (1995), 107 Ohio App.3d 315, 319. Therefore, our standard of review is de novo.

{¶9} An arbitration agreement is enforceable unless grounds exist at law or in equity for revoking the agreement. R.C. 2711.01(A). As explained by our brethren from the Tenth District in *Corl v. Thomas & King*, Franklin App. No. 05AP-1128, 2006-Ohio-2956, ¶8:

{¶10} "A valid arbitration agreement, like any contract, requires an offer and acceptance that is supported by consideration and is premised on the parties' meeting of the minds as to the essential terms of the agreement. *Miller v. Lindsay-Green, Inc.*, Franklin App. No. 04AP-848, 2005-Ohio-6366; *Dantz v. Apple Ohio LLC* (N.D. Ohio 2003), 277 F.Supp.2d 794. Consideration may consist of either a detriment to the promisee or a benefit to the promisor. *Lake Land Emp. Group of Akron, LLC v. Columber*, 101 Ohio St.3d 242, 804 N.E.2d 27, 2004-Ohio-786."

{¶11} In her appellate brief at 3-4, appellant admits the following:

{¶12} "On June 13, 2007, Jane Doe's Power of Attorney, Jill Doe, signed another Residential Care Admission Agreement drafted by Canton Regency on behalf of Jane Doe for her to live in **Canton Regency's Special Care Unit and received 'I'**

level of care. June 13, 2007 Canton Regency Residential Care Admission Agreement (hereinafter 'June 13, 2007 Admission Agreement,' attached hereto as **Exhibit 2** with name of Jane Doe and her POA redacted, attached as Exhibit A to Motion to Dismiss, or in the Alternative Motion to Stay Proceedings and Compel Arbitration (Oct. 9, 2009, moved to be filed under seal Nov. 4, 2009).

{¶13} "Attachment A to the June 13, 2007 Residential Care Agreement titled 'Limitation of Liability/Arbitration Agreement' (hereinafter 'June 13, 2007 Attachment Limitation of Liability/Arbitration Agreement') starts:

{¶14} "**As consideration for the admission of the Resident to the Facility** [Capital Senior Living doing business as Canton Regency Residential Care], the Resident or the Legal Representative on behalf of the Resident hereby enters into this Limitation of Liability agreement . . . (emphasis added)."

{¶15} Despite this admission, it is appellant's position that no consideration was given because Jane Doe had been a resident of the facility for the last two years, and in her original 2006 admission agreement with appellee, no such Limited Liability/Arbitration Agreement was included. The affidavit supplied by appellee's Executive Director, Alan Gruber, addressed the issue as follows:

{¶16} "4. On October 8, 2005, Jane Doe and her husband, signed the 'Canton Regency Independent Center Resident Agreement and Attachments' and moved into an Independent Living Facility Apartment, located at 4515 22nd St. N.W., Apt. 155, Canton, Ohio 44708 from October 8, 2005 through June 13, 2007.

{¶17} "5. On June 13, 2007, Jane Doe moved from her Independent Living apartment into a Special Care apartment (licensed as assisted living/residential care by the State of Ohio) located at 4515 22nd St. N.W., Apt. 429, Canton, Ohio 44708.

{¶18} "6. On June 13, 2007, pursuant to Ohio Admin. Code 3701-17-57(C), Jane Doe and her Power of Attorney, signed the 'Canton Regency Residential Care Special Care Facility Admission Agreement and Attachments.'

{¶19} "7. A different and higher level of care is provided to residents residing in residential care/special units at Canton Regency as opposed to those residing in independent living apartments.

{¶20} "8. Pursuant to Ohio Administrative Code Chapter 3701-17-57(C), A (sic) residential care facility shall enter into a written resident agreement with each prospective resident prior to beginning residency in the residential care facility.

{¶21} "9. Moving a patient to a higher level of care requires a new residency agreement pursuant to Ohio law." See, Gruber aff., attached to Plaintiff's November 5, 2009 Opposition to Defendant's Motion to Dismiss/Motion to Compel Arbitration.

{¶22} Appellant's sur-reply filed November 17, 2009 under seal argues Jane Doe's admission to the "34-bed residential care facility in 2006 without the arbitration agreement demonstrates that no new or valuable consideration was given to the decedent when she was re-admitted in 2007."

{¶23} The 2006 Admission Agreement, attached to Appellant's Brief as Exhibit 1, references an Attachment A, Limitation of Liability Agreement. The 2007 Admission Agreement, attached to Appellant's Brief as Exhibit 2, references a Limitation of Liability/Arbitration Agreement, and same is attached. We find Jane Doe's claimed

injuries were sustained after the signing of the 2007 Admission Agreement, as the July 15, 2009 complaint cited dates of March 18, 19 and 20, 2008, and October 4 and 11, 2008.

{¶24} It is appellee's position the consideration was Jane Doe's 2007 admission to the 34-bed special care facility from the independent living apartment facility.

{¶25} In another affidavit filed by Mr. Gruber, he gave the following detailed description of Jane Doe's residence with appellee:

{¶26} "3. Jane Doe was a resident in various facilities within the Canton Regency Retirement Community between 9/19/05 and 11/5/08, based upon her needs at any given time.

{¶27} "4. Each time Jane Doe resided in the special care and/or assisted living unit, it was a requirement that she sign another agreement.

{¶28} "6. Jane Doe's residency status at the Canton Regency Retirement Community was as follows:

{¶29} "a. 9/19/05 to 10/8/05 – Plaintiff resided in the health center which is a skilled nursing and rehab unit.

{¶30} "b. 10/8/05-8/28/06 – Plaintiff resided in the independent living apartment with her husband.

{¶31} "c. 8/28/06-10/9/06 – Plaintiff transferred to the special care/assisted living unit for a temporary respite stay.

{¶32} "d. 10/10/06-3/22/07 – Plaintiff returned to the independent living apartment with her husband.

{¶33} "e. 3/23/07-4/13/07 - Plaintiff was transferred to the assisted living unit for a temporary respite stay.

{¶34} "f. 4/14/07-6/12/07 - Plaintiff went back to the independent living apartment with her husband.

{¶35} "g. 6/13/07-11/5/08 – Plaintiff was transferred permanently to the special care/assisted living unit where she stayed until she left Canton Regency on 11/5/08." See, Gruber aff., attached to Defendant Capital Senior Living, ILM-B, Inc. dba Canton Regency Health Care Center's November 25, 2009 Motion to File Instant Response to Plaintiff's Sur-Reply.

{¶36} Appellant's counsel argues this affidavit is inconsistent with Mr. Gruber's other affidavit and should be rejected. We disagree that it is inconsistent. We choose to characterize it as more precise or in greater detail. Further, it specifically addressed the issues raised in appellant's sur-reply.

{¶37} The gravamen of this appeal is whether the admission to the special care facility was sufficient consideration to make the Limitation of Liability/Arbitration Agreement enforceable. We answer in the affirmative.

{¶38} Immediately prior to her admission to the special care unit on June 13, 2007, Jane Doe resided in appellee's independent living apartment facility. The special care unit is designated specifically in the agreement as a "34-bed residential care facility." From the very descriptions given by the caregiver, we find the independent living apartment facility is separate and distinct from the 34-bed special care unit; therefore, an agreement to abide by the Limitation of Liability/Arbitration Agreement was a condition precedent to admission, and admission was predicated upon Jane Doe

being bound by the Limitation of Liability/Arbitration Agreement. See, Gruber aff. at ¶10, attached to Plaintiff's November 5, 2009 Opposition to Defendant's Motion to Dismiss/Motion to Compel Arbitration.

{¶39} In *Hayes v. Oakridge Home*, 122 Ohio St.3d 63, 2009-Ohio-2054, ¶43, the Supreme Court of Ohio found consideration existed apart from the precondition of admission requirement when both sides give up their "right to trial, as well as all correlating rights in the judicial process***."

{¶40} In paragraph three of the Limitation of Liability/Arbitration Agreement, both appellant and appellee agreed to arbitrate all claims as allowable by law. In paragraph four, Jane Doe agreed to give up her right to a jury trial. We note the issues of procedural and substantive unconscionability which were the main issues in *Hayes* were not raised sub judice.

{¶41} Upon review, we conclude valuable consideration has been established to render the 2007 Limitation of Liability/Arbitration Agreement enforceable.

{¶42} The sole assignment of error is denied.

{¶43} The judgment of the Court of Common Pleas of Stark County, Ohio is hereby affirmed.

By Farmer, J.

Edwards, P.J. and

Wise, J. concur.

s/ Sheila G. Farmer

s/ Julie A. Edwards

s/ John W. Wise

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