Filed 12/13/18 Jordan v. Park Regency Care, LLC CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

GAY JORDAN et al., Plaintiffs and Respondents, v. PARK REGENCY CARE, LLC et al., Defendants and Appellants.	B288743 (Los Angeles County Super. Ct. No. VC066220)

APPEAL from an order of the Superior Court of Los Angeles County, Lori A. Fournier, Judge. Affirmed.

Lewis Brisbois Bisgaard & Smith, Lann G. McIntyre, Brittany Bartold Sutton, Kathleen M. Walker, Staci L. Trang and Jeffrey Healey for Defendants and Appellants.

Lanzone Morgan, James M. Morgan, Anthony C. Lanzone, Amber M. Tham and Andrew Micaraset for Plaintiffs and Respondents.

I. INTRODUCTION

Defendants Park Regency Care, LLC dba Park Regency Care Center (Park Regency) and Sun Mar Management Services, Inc. appeal from the denial of their petition to compel arbitration. Defendants contend plaintiff Gay Jordan[1] (Gay) entered into an arbitration agreement as part of her admission into a skilled nursing facility run by Park Regency. Gay is now deceased and represented here by her son and successor in interest Craig Jordan (Craig). Craig and plaintiff Sarah Kaufold (Sarah), Gay's daughter, also sued individually. Plaintiffs argue that when Craig signed the admission paperwork on behalf of Gay, he was not authorized as Gay's agent to agree to arbitration. We affirm.

II. FACTUAL BACKGROUND[2]

Park Regency is a skilled nursing facility providing long-term care and is owned by Sun Mar Management Services, Inc. In 2015, Gay was 69 years old, suffered from Parkinson's Disease, and needed assistance with daily activities. On December 30, 2015, Craig signed a California Standard Admission Agreement for Gay to be admitted into Park Regency. He signed as the "Resident's Representative." Craig also signed an Authorization for Disclosure of Medical Information as the "Resident's

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[1] Because some of the parties share a last name, we refer to them by their first names. No disrespect is intended.

[2] For the purpose of the petition to compel arbitration, the following facts were undisputed.

Representative," an Assignment of Insurance Benefits as the "Resident's Agent," an Advance Directive Acknowledgement as the "Resident Representative," an Acknowledgement of Receipt of Notice of Privacy Practices as the "Resident Legal Representative," and a Temporary Consent for Treatment as an "Agent/Legal Representative."

Included among the admission paperwork was an arbitration agreement. The arbitration agreement was a separate document with separate signature lines. It stated at the top that it was "Not Part of Admission Agreement" and residents "shall not be required to sign this arbitration agreement as a condition of admission to this facility." It further stated the parties agreed to arbitrate any dispute as to medical malpractice and all claims "arising out of the provision of services by the Facility, the admission agreement, the validity, interpretation, construction, performance, and enforcement thereof, or which allege violations of the Elder Abuse and Dependent Adult Civil Protection Act, the Unfair Competition Act, the Consumer Legal Remedies Act, or which seek an award of treble damages, punitive damages or attorney fees."

Craig signed the arbitration agreement twice on two signature lines for "Legal Representative/Agent (if any)" and below two statements that: "By virtue of Resident's consent, instruction and/or durable power of attorney, I hereby certify that I am authorized to act as Resident's agent in executing and delivering of this arbitration agreement. I acknowledge that the Facility is relying on this representation."

On March 2, 2016, Gay was transferred from the skilled nursing facility to a hospital and died on April 12, 2016.

On April 6, 2017, Gay, by and through her successor in interest, Craig, Craig individually, and Sarah filed a complaint against defendants for elder abuse and neglect, violation of the Patient's Bill of Rights, and wrongful death. On July 27, 2017, defendants petitioned to compel arbitration, arguing that Craig was Gay's agent in signing the arbitration agreement by virtue of an advanced health care directive. Plaintiffs responded that defendants had not shown Craig was authorized as Gay's agent to sign the arbitration agreement because the advanced health care directive required a determination by Gay's physician of her inability to make decisions and designated Sarah as the primary agent. On July 27, 2017, the trial court issued a tentative decision denying the petition to compel arbitration without prejudice because Craig's signature on the arbitration agreement was insufficient to bind Gay and the advanced health care directive did not give Craig authority to act as her agent. Later that day the trial court denied the petition without prejudice.

Defendants then took Craig's deposition. The pertinent testimony included:

"Q. Okay. Did you sign any of the admission documents, or did your mother, if you know?

"A. I believe I did.

"Q. Okay. All right. Did you have any conversation with your mother where she said it was okay for you to go ahead and sign the documents on her behalf?

"A. Yes."

With Craig's testimony in hand, defendants filed a renewed petition to compel arbitration arguing that Craig's deposition testimony established his authority to sign the arbitration agreement as Gay's agent. Plaintiffs countered that the holding

in *Young v. Horizon West, Inc. (*2013) 220 Cal.App.4th 1122 (*Young*) controlled, and under that case, Craig's testimony that Gay had said it was okay for him to sign admission documents was not sufficient evidence of his authority to sign an arbitration agreement. In reply, defendants argued *Young* was not controlling because Craig's authority was more certain than the vague discussion between the parent and child in *Young*. The trial court denied the renewed petition, finding *Young* was analogous and Craig's "deposition testimony fail[ed] to demonstrate [Gay's] express authority to [Craig], granting him the authority to sign an agreement forgoing her right to a jury trial."

III. STANDARD OF REVIEW

The parties dispute whether a de novo or substantial evidence standard of review applies here. "In general, '[t]here is no uniform standard of review for evaluating an order denying a motion to compel arbitration. [Citation.] If the court's order is based on a decision of fact, then we adopt a substantial evidence standard. [Citations.] Alternatively, if the court's denial rests solely on a decision of law, then a de novo standard of review is employed. [Citations.]'" (*Laswell v. AG Seal Beach, LLC* (2010) 189 Cal.App.4th 1399, 1406.)

When the question is whether an arbitration agreement exists, "[i]f the facts are undisputed, on appeal we independently review the case to determine whether a valid arbitration agreement exists." (*Hutcheson v. Eskaton FountainWood Lodge* (2017) 17 Cal.App.5th 937, 944.) Likewise, even though "[a]gency is generally a question of fact[,] . . . '[w]hen the essential facts are

not in conflict and the evidence is susceptible to a single inference, the agency determination is a matter of law for the court. [Citation.]'" (*van't Rood v. County of Santa Clara* (2003) 113 Cal.App.4th 549, 562 (*van't Rood*).)

However, when more than one reasonable inference can be drawn from the undisputed evidence, '"'"'the determination of whether the evidence supports one conclusion or the other is for the trial court, and a reviewing court may not disturb such finding if there is any substantial evidence to support it.'"'" (*McDermott Will & Emery LLP v. Superior Court* (2017) 10 Cal.App.5th 1083, 1102.) In that situation, "we must 'accept as true all evidence and all reasonable inferences from the evidence tending to establish the correctness of the trial court's findings and decision . . . .'" (*Young, supra*, 220 Cal.App.4th at p. 1130, fn. 6; see also *Baker v. Osborne Development Corp.* (2008) 159 Cal.App.4th 884, 860-861 [where the trial court's determination "turned on the resolution of conflicts in the evidence or on factual inferences to be drawn from the evidence, we consider the evidence in the light most favorable to the trial court's ruling and review the trial court's factual determinations under the substantial evidence standard"].)

IV. DISCUSSION

A. *Admission Agreements to Skilled Nursing Facilities*

Under California law, "[w]hen a patient is admitted to a skilled nursing facility, the patient or the patient's representative must sign a standard admission agreement." (*Flores v. Evergreen at San Diego, LLC* (2007) 148 Cal.App.4th 581, 585 (*Flores*).) The

Health and Safety Code governs admission agreements for skilled nursing facilities, including any accompanying arbitration agreement, in great detail. (Health & Saf. Code, § 1599.61 et seq.) "If the facility requests that the patient agree to arbitration, this provision cannot be included in the standard admission agreement. Instead, it must be set forth in a separate document with a separate signature line." (*Flores, supra*, 148 Cal.App.4th at p. 585, citing Health & Saf. Code, § 1599.81, subd. (b).) Specifically, Health and Safety Code section 1599.81 requires a clear statement that the "agreement to arbitration is not a precondition for medical treatment or for admission to the facility," states the "arbitration clauses shall be included on a form separate from the rest of the admission contract" and shall be separately signed, and directs that the form containing the arbitration clauses must contain certain statements regarding the arbitration of medical malpractice claims and that the patient may not waive the ability to sue for violation of the Patient's Bill of Rights. (Health & Saf. Code, § 1599.81, subds. (a), (b).)

B. *Actual Agency*

"[T]he right to compel arbitration depends upon the existence of a valid agreement to arbitrate between the parties." (*Garrison v. Superior Court* (2005) 132 Cal.App.4th 253, 263 (*Garrison*).) Although "California has a strong public policy in favor of arbitration, there is no preference for the arbitral forum when the parties have not agreed to arbitrate." (*Id*. at pp. 263-264.) "The party seeking to compel arbitration bears the burden of proving the existence of a valid arbitration agreement." (*Flores, supra*, 148 Cal.App.4th at p. 586.)

"Generally, a person who is not a party to an arbitration agreement is not bound by it." (*Flores, supra*, 148 Cal.App.4th at p. 587.) However, a person acting as a patient's agent who signs an arbitration agreement with a health care facility can bind the patient. (*Ibid.*; *Garrison, supra*, 132 Cal.App.4th at p. 264, citing *Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 709 (*Madden*).) Thus, whether the patient is bound to an arbitration agreement the patient did not sign depends on whether the person signing the agreement was acting as the patient's agent, either actual or ostensible.

"Actual agency typically arises by express agreement," which can be oral. (*van't Rood, supra*, 113 Cal.App.4th at p. 571.) Conduct by the agent alone is not sufficient to establish agency; "'[w]ords or conduct by both principal and agent are necessary to create the relationship . . . .'" (*Ibid.*; *Flores, supra*, 148 Cal.App.4th at pp. 587-588 ["an agency cannot be created by the conduct of the agent alone; rather *conduct by the principal* is essential to create the agency"].) Thus, the fact that a relative acted as if he was the patient's agent by signing admission documents, including an arbitration agreement, is not sufficient to establish that he was the patient's agent without conduct by the patient "conferring that status." (*Flores, supra*, 148 Cal.App.4th at p. 589.)

Even when the principal has authorized an agent, the principal is bound only when the agent acts within the scope of the agency. (*Madden, supra*, 17 Cal.3d at pp. 705-706 ["The acts of an agent within the scope of his authority bind the principal . . . ."].) For example, the fact that a patient consented to her daughter making medical decisions and signing medical documents for her "does not, however, justify expanding [the

daughter's] powers beyond what the evidence shows mother permitted." (*Goliger v. AMS Properties, Inc.* (2004) 123 Cal.App.4th 374, 377; see also *van't Rood, supra*, 113 Cal.App.4th at pp. 575-576 [oral agreement that other person "would take care of the paperwork" concerning a land division did not give that person authority as an agent on other land matters].)

Both parties and the trial court focused on the decision in *Young*. There the patient's daughter had signed an arbitration agreement among the various documents to admit her mother into a skilled nursing facility. (*Young, supra*, 220 Cal.App.4th at p. 1126.) The patient testified that "her daughter knew from conversations what her wishes were, '[t]o receive the care that was possible at the time.'" (*Id.* at p. 1130.) When asked whether her daughter had authority "'to complete paperwork' on her behalf when she arrived at [the facility]," the patient said, "'As far as I know, she had permission to take care of details like that.'" (*Ibid.*) Based on this evidence, the trial court ruled "there was 'no direct evidence of plaintiff's acquiescence'" to an arbitration agreement. (*Ibid.*) On appeal, the court noted "[n]o mention was made of authorization to sign any agreements other than for medical services, either at the hospital or later, at [the facility]," and held that the trial court did not err in ruling there was insufficient evidence of authorization to sign the arbitration agreement. (*Ibid.*)

The trial court here relied on *Young* to decide that Craig's "deposition testimony fails to demonstrate [Gay's] express authority to [Craig], granting him the authority to sign an agreement forgoing her right to a jury trial." Defendants argue that *Young* is distinguishable because the patient was vague about whether she had authorized her daughter to sign an

arbitration agreement, whereas Craig testified Gay gave him express authority to sign the admission documents. Defendants infer that Gay included the arbitration agreement among the "admission documents" she said Craig could sign. Plaintiffs contend the deposition testimony does not establish Gay authorized Craig to sign the arbitration agreement because defendants only asked generally about "admission documents." Plaintiffs infer that Gay did not intend to include the arbitration agreement when she told Craig he could sign the "admission documents."

Whether the scope of Craig's authority included signing the arbitration agreement is not clear. The essential fact—that Gay told Craig it was okay for him to sign the admission documents—is undisputed, but that evidence is reasonably susceptible to both parties' conflicting inferences. In that situation, we may not disturb the conclusion of the trial court if there is substantial evidence to support it. (*McDermott Will & Emery LLP v. Superior Court, supra*, 10 Cal.App.5th at p. 1102.)

The trial court's conclusion is supported by the evidence of the circumstances of the signing of the admission documents and arbitration agreement. Craig and Gay were at the facility on the day Gay was admitted, which was also when Craig went over the paperwork. Craig and Gay discussed the admission documents, but when Craig signed the documents, his mother was not in the room. It is reasonable to infer that Craig and Gay were focused on getting Gay admitted, and not on matters not necessary for her admission such as the arbitration agreement. And the fact that Gay was not physically present as Craig signed the documents meant that when he came to the arbitration

agreement among the stack of documents to be signed, he could not ask her about arbitration.

An inference that the authority extended only to the documents necessary to admit Gay is consistent with the regulatory scheme and the Legislature's intent that admission decisions be made separately from arbitration decisions. Recognizing that often a family member needs to make health and medical decisions for a patient without obtaining formal consent or authorization, the Legislature enacted numerous provisions allowing a next of kin to make health care and medical decisions in certain situations. (*Flores, supra*, 148 Cal.App.4th at pp. 590-591 [discussing multiple statutes and regulations].) Deciding to forego a jury trial is a different type of decision. "Unlike admission decisions and medical care decisions, the decision whether to agree to an arbitration provision in a nursing home contract is not a necessary decision that must be made to preserve a person's well-being. Rather, an arbitration agreement pertains to the patient's legal rights, and results in a waiver of the right to a jury trial." (*Id.* at p. 594.) The detailed statutes regulating admission agreements and requiring an arbitration agreement to be on a separate form, separately signed, and not a condition to admission emphasize that agreeing to the terms of admission is separate and distinct from agreeing to arbitration.

Defendants argue that even if Gay only authorized the signing of admission documents, that was sufficient to cover the arbitration agreement because a general agent is authorized to do everything "necessary or proper and usual" for effecting the purpose of his agency, citing *Madden* and Civil Code section 2319. In *Madden*, the dispute turned on whether an agent empowered to negotiate a group medical contract had the

authority to agree to an arbitration provision, which the court answered affirmatively. (*Madden, supra*, 17 Cal.3d at p. 706.) Defendants' argument presumes that an arbitration agreement is a necessary or proper and usual part of being admitted to a skilled nursing facility. But after *Madden*, the Legislature established the extensive regulations applicable to nursing home contracts, including mandating that arbitration agreements are to "clearly indicate that agreement to arbitration is not a precondition for medical treatment or for admission to the facility." (Health & Saf. Code, § 1599.81 (a).)[3] Thus, an arbitration agreement is expressly not necessary for admission to a skilled nursing facility.

Likewise the regulation of these arbitration agreements indicates that entering into an arbitration agreement may not be "proper and usual" for effecting the purpose of admitting a patient to a skilled nursing facility. The Legislature has made clear that entering into an arbitration agreement is distinct from and in addition to taking the steps to be admitted to a facility. Defendants have not shown that signing an arbitration agreement is a proper and usual part of a patient's admission to a skilled nursing facility.

Defendants also rely on cases where the family member signing the arbitration agreement acted under a health care power of attorney or personal care power of attorney. Those cases hold that "when an agent under a health care power of attorney is faced with selecting a long-term health care facility, as part of the health care decisionmaking process (Prob. Code, § 4617), he or she may well be asked to decide whether to sign an arbitration

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[3] Health and Safety Code section 1599.81 was enacted in 1987, eleven years after *Madden*.

agreement as part of the admissions contract package," and the agent is authorized to do that. (*Hogan v. Country Villa Health Services* (2007) 148 Cal.App.4th 259, 267-268 (*Hogan*), discussing *Garrison, supra,* 132 Cal.App.4th 253.) Health care powers of attorney are governed by the Probate Code, which give the agent broad power to make health care decisions. *Hogan, supra*, 148 Cal.App.4th at 265.) Craig had no health care power of attorney, so these cases are inapplicable. Indeed, *Hogan* recognized that the absence of a health care power of attorney is a "critical" distinction. (*Id.* at p. 268.)

Personal care powers of attorney are different and do not authorize agents to sign arbitration agreements as part of the admission to a health care facility, such as a skilled nursing facility. (*Hutcheson v. Eskaton FountainWood Lodge, supra*, 17 Cal.App.5th at pp. 956-957 [interpreting Power of Attorney Law and Health Care Decisions Law in Probate Code].) And, in any event, Craig did not hold a personal care power of attorney when he signed the arbitration agreement.

C. *Ostensible Agency*

Defendants argue that if Craig was not authorized as Gay's actual agent, he acted as her ostensible agent. "'An agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him.' (Civ. Code, § 2300.)" (*van't Rood, supra*, 113 Cal.App.4th at p. 570.) Defendants did not make this argument in the trial court. "'As a general rule, theories not raised in the trial court cannot be asserted for the

first time on appeal . . . .'" (*Nellie Gail Ranch Owners Assn. v. McMullin* (2016) 4 Cal.App.5th 982, 997.)

But even if defendants did not forfeit this theory by not raising it in the trial court, it does not advance their case now. Defendants contend that by allowing Craig to sign the arbitration agreement and not rescinding it, Gay caused Park Regency to believe he had the authority to bind her to the arbitration agreement. However, a family member's signing admission paperwork or an arbitration agreement is not evidence of ostensible authority because "ostensible authority cannot be created merely by a purported agent's representation." (*Young, supra*, 220 Cal.App.4th at p. 1132.) And, there is no evidence that Park Regency heard Gay say that Craig could sign the admission documents. Craig testified that he did not recall if he told Park Regency that Gay had told him to sign the documents, and Gay was in another room when he signed the documents. Similarly, without evidence that Gay knew about the arbitration agreement, her failure to rescind it means nothing. Defendants did not establish that Gay caused Park Regency to believe Craig was her agent.

In short, the record supports the conclusion that defendants did not carry their burden of proving the existence of a valid arbitration agreement.

V. DISPOSITION

The order is affirmed. Plaintiffs Gay Jordan, Craig Jordan, and Sarah Kaufold are awarded their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

SEIGLE, J.*

We concur:

MOOR, Acting P. J.

KIM, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.