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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

GLORIA MANNING, individually and as successor, etc., et al., Plaintiffs and Respondents, v. S&F MANAGEMENT CO. LLC, Defendant and Appellant.	B282385 (Los Angeles County Super. Ct. Nos. BC585195/BC600075)

APPEAL from an order of the Superior Court of Los Angeles County, Ross M. Klein, Judge. Reversed and remanded with directions.

Giovanniello Law Group, Alexander F. Giovannioello, Paul H. Kang and Thomas C. Swann for Defendant and Appellant.

Balisok & Associates, Inc. and Russell S. Balisok for Plaintiffs and Respondents.

INTRODUCTION

Plaintiffs Mickey Manning and Michael Manning, individually, and Gloria Manning individually and as a successor in interest to Michelle Manning, brought this elder abuse and wrongful death action against defendants Blythe Windsor Country Park Health Center, Lawrence Feigen, Calvin Warren, Lee Samson, and S&F Management Co., LLC. Defendants moved the trial court to compel arbitration based on an agreement signed by one of the plaintiffs on behalf of the decedent, Michelle. The trial court granted in part defendant's motion to compel arbitration, ordering plaintiffs and all defendants but S&F into arbitration. S&F appeals the trial court's denial of the motion to compel arbitration as to claims against S&F. Because we find plaintiffs' claims against all defendants are intertwined, we reverse and remand for the trial court to order plaintiffs to arbitrate their claims against S&F.[1]

FACTS AND PROCEDURAL BACKGROUND

1. Michelle Enters Nursing Home and Care Declines When Her Mother Can No Longer Assist Her

In 1988 when she was 24 years old, Michelle (the decedent on whose behalf this case was brought) had a severe allergic reaction to penicillin. As a result, Michelle lost total mental function, became a resident of defendant nursing home Blythe Windsor Country Park Health Center (Windsor), and remained in a vegetative state the rest of her life. Michelle died in 2015.

For some 22 years, plaintiff Gloria (Michelle's mother) visited Michelle daily at Windsor and ensured she was well taken

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[1] Because we discuss several members of the Manning family, we sometimes refer to them by their first name or by their familial relationship to Michelle, intending no disrespect.

care of. Gloria suffered a stroke in 2010, and thereafter could not regularly check in on or care for Michelle. Plaintiffs alleged that during this time, Michelle was not properly bathed, fed, repositioned, or monitored. As a result, Michelle suffered malnutrition, dehydration, and infections, and eventually died from an infection.

2. Lawsuit

On June 16, 2015, Gloria filed a complaint on Michelle's behalf against all defendants, alleging negligence, elder abuse, fraud, and violation of patient rights. The complaint alleged that Michelle's care started to decline in late 2011. The named defendant individuals were agents and employees of Windsor. Defendant S&F operated the facility pursuant to a contract it had with Windsor. Five months after the original lawsuit, Michelle's sister and brother (Mickey and Michael), and Gloria filed a complaint for wrongful death against defendants. The court consolidated the actions on April 15, 2016.

3. Demand for and Motion to Compel Arbitration

On September 4, 2015, defendants demanded petitioners submit to arbitration based on a 2012 arbitration agreement signed by Michelle's sister on behalf of Michelle. In January 2012, Michelle's sister had signed numerous documents, including Windsor's Nursing Facility Admission Agreement. As part of the packet of documents, the sister also signed a separate document called "Resident-Facility Arbitration Agreement." Plaintiffs refused to arbitrate, stating the sister had no legal authority to sign the arbitration agreement on Michelle's behalf.

During discovery, defendants sought documents, propounded admissions, and elicited testimony about whether Michelle had given plaintiffs power of attorney. In November 2015, defendants propounded requests for production on Gloria,

seeking any documents related to a power of attorney executed by Michelle. Gloria responded that she was unable to comply with the request because such documents were "lost or destroyed."

Defendants deposed the sister on August 3, 2016. She testified that in 1987 (a year before Michelle's allergic reaction to penicillin), Michelle signed a durable power of attorney in her favor. The sister stated she was looking for the durable power of attorney but had not been able to locate it.

On October 17, 2016, defendants filed a petition to compel arbitration, which included a copy of the arbitration agreement as well as the sister's testimony about having Michelle's power of attorney. Plaintiffs opposed the request, raising many of the arguments they reiterate on appeal: the sister lacked agency, the agreement failed to comply with Code of Civil Procedure section 1295 and Health and Safety Code section 1599.65, and the arbitration agreement did not apply retroactively to events that occurred at the nursing home prior to 2012. We discuss these points below.

4. Ruling on the Motion to Compel Arbitration

On March 2, 2017, the trial court granted the arbitration petition on behalf of all defendants except S&F. The court found a valid, enforceable arbitration agreement between Michelle and Windsor. The court held that because the individual defendants were agents and employees of Windsor, per plaintiffs' complaint, they were beneficiaries of the arbitration agreement. The court denied the motion as to defendant S&F, finding that it "has not been provided evidence that S&F Management Co. is a third-party beneficiary because it is a separate entity with no connection to the arbitration agreement."

With respect to the sister's authority to execute the Arbitration Agreement, the court concluded: "Plaintiff has not

met its burden in showing that the durable power of attorney signed by Michelle Manning in favor of [her sister] in 1987 restricted [the sister]'s ability to arbitrate Michelle's claims. The evidence shows that while [the sister] has attested to the existence of durable power of attorney and signed an arbitration agreement on Michelle's behalf, she has repeatedly failed to produce the document itself." The court found the "stand-alone arbitration agreement, not the medical services contract, was the contract that contained the arbitration agreement." The court further found the Arbitration Agreement "included the required text and [it] was prominently displayed." As such, it complied with various statutory requirements.

5. Plaintiff's Writ Denied; Defendant's Present Appeal

On May 25, 2017, plaintiffs filed a petition for writ of mandate, challenging the trial court's decision compelling arbitration with the nursing home and individual defendants. We summarily denied that petition on June 1, 2017.

Also in May 2017, defendant S&F brought the present appeal of the trial court's ruling excluding it from the order compelling arbitration. (Code Civ. Proc., § 1294, subd. (a).)

DISCUSSION

S&F contends that the court should have granted the motion to compel arbitration of the claims against S&F. "There is no uniform standard of review for evaluating an order denying a motion to compel arbitration. If the court's order is based on a decision of fact, then we adopt a substantial evidence standard. Alternatively, if the court's denial rests solely on a decision of law, then a de novo standard of review is employed." (*Robertson v. Health Net of California, Inc.* (2005) 132 Cal.App.4th 1419, 1425, citations omitted.)

This appeal raises two questions: (1) is there a valid, enforceable arbitration agreement? and if so, (2) can S&F, a non-signatory, compel arbitration by invoking an agreement between Windsor and Michelle? (See *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413.) For reasons we discuss below and applying the appropriate standard of review, the answer to both questions is yes.

1. There is a Valid Arbitration Agreement

We put aside for the moment S&F's sole affirmative contention on appeal that the trial court erred in not compelling arbitration of the claims against S&F when it sent the claims against the other defendants to arbitration. Instead, we start our analysis with the points plaintiffs first made in their earlier writ petition that challenged the order compelling arbitration and that they reiterate in their respondents' brief here: There is no valid arbitration agreement. Although we denied the earlier writ petition, a summary denial has no binding effect. (*Frisk v. Superior Court* (2011) 200 Cal.App.4th 402, 415 ["Summary denials do not constitute law of the case, and do not establish any legal precedents."].) Hence, we address plaintiffs' enforceability argument afresh.

Plaintiffs present five arguments that the agreement is invalid and unenforceable: (a) the parties to the agreement are undefined; (b) Michelle's sister lacked authority to sign the agreement on Michelle's behalf; (c) the agreement failed to comply with Code of Civil Procedure section 1295, subdivision (a); (d) the agreement failed to comply with Health and Safety Code section 1599.65; and (e) the arbitration agreement does not apply to some of the claims because it does not apply retroactively to claims that arose before the arbitration agreement was signed in 2012. We address each in turn.

(a) Undefined Parties

Plaintiffs first argue that the parties to the arbitration agreement are undefined and therefore, the agreement is unenforceable. The arbitration agreement, which was part of a packet of documents that identified Michelle as the resident and Windsor as the nursing home facility, states that the agreement is between the "Facility" and the "Resident." Because this particular two-page document does not define either term, plaintiffs assert that the contract violated Civil Code section 1558, which requires valid contracts to identify the parties.[2]

Plaintiffs never made this argument in the trial court. An appellate court generally will not consider a matter presented for the first time on appeal (*Franz v. Board of Medical Quality Assurance* (1982) 31 Cal.3d 124, 143), and a failure to raise an issue or argument in the trial court will result in it being forfeited on appeal. (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2006) 136 Cal.App.4th 212, 226; *Feduniak v. California Coastal Com.* (2007) 148 Cal.App.4th 1346, 1381 [failure to raise issue in trial court waives the point on appeal].) Even addressing the merits, it is clear from the compilation of documents signed by the sister that the resident is Michelle and the facility is Windsor.

(b) Agency

Second, plaintiffs assert the sister lacked Michelle's authority to sign the arbitration agreement on her behalf. The sister testified Michelle signed a durable power of attorney in the

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[2] Civil Code section 1558 states, "It is essential to the validity of a contract, not only that the parties should exist, but that it should be possible to identify them."

sister's favor in 1987, even though in 2016, the sister could not locate the actual power of attorney.

The " ' " 'testimony of an agent sworn as a witness in a case, when the question of his agency is involved, is competent to establish it and its extent and nature.' " ' " (*Clifton Cattle Co. v. Thompson* (1974) 43 Cal.App.3d 11, 20, internal quotations omitted; *Sokolow v. City of Hope* (1953) 41 Cal.2d 668, 674 [" 'The fact of agency where it rests in parol may be established at the trial by testimony of the agent himself.' "].) This testimony established that Michelle designated her sister as her agent. (See *Garrison v. Superior Court* (2005) 132 Cal.App.4th 253, 265 [power of attorney designates an agent to make decisions on behalf of principal].) The trial court reasonably could have found that it was within the scope of the sister's agency to enter into an arbitration agreement on Michelle's behalf in the context of Michelle's nursing home admission: "The decision to enter into optional revocable arbitration agreements in connection with placement in a health care facility . . . is a 'proper and usual' exercise of an agent's powers." (*Id.* at p. 266.) Thus, the sister's deposition testimony was sufficient to support the court's finding of agency.

(c) Code of Civil Procedure Section 1295

Plaintiffs assert the arbitration agreement is invalid because the admission agreement does not have an arbitration clause as its first provision, as required under Code of Civil Procedure section 1295, subdivision (a). Code of Civil Procedure section 1295 sets forth various requirements for a contract for medical services containing "a provision for arbitration of any dispute as to professional negligence of a health care provider." (Code Civ. Proc., § 1295, subd. (a).) Such contracts "shall have such [arbitration] provision as the first article of the contract and

shall be expressed" using specified language explaining that any dispute must be submitted to arbitration. (*Ibid.*)

Here, the requisite arbitration language is found not in the *admission* agreement but in the first provision of the separate *arbitration* agreement. Plaintiffs contend that, even if there is a separate arbitration agreement, the admission agreement must also contain an arbitration clause as its first provision.

We agree the arbitration agreement was not "contained" in the admission agreement but rather in a separate document devoted entirely to arbitration.[3] Nevertheless, we conclude under the facts of this case, there was substantial compliance with Code of Civil Procedure section 1295's mandatory placement of the arbitration clause in the first provision of the admission agreement. The arbitration agreement itself has, as its first provision, the language required under section 1295, subdivision (a).

As part of our conclusion, we observe that the separate agreement also complies with Health and Safety Code section 1599.81's requirements for contracts involving patients and long-term health care facilities. (*Hogan v. Country Villa Health Services* (2007) 148 Cal.App.4th 259, 267.) Subdivision (b) of the statute requires "All arbitration clauses shall be included on a form separate from the rest of the admission contract." The Legislature enacted Health and Safety Code section 1599.81 in 1987. Code of Civil Procedure section 1295 was enacted in 1975.

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[3] The admission agreement references arbitration in its index, identifying two attachments containing arbitration agreements. When we turn to those attachments, the text is crossed out. The signed arbitration agreement at issue on appeal appears at the end of the packet of documents Michelle received at admission.

"If conflicting statutes cannot be reconciled, later enactments supersede earlier ones." (*Collection Bureau of San Jose v. Rumsey* (2000) 24 Cal.4th 301, 310.)

Although a strained reading of the two sections might allow their reconciliation by the requirement that the arbitration agreement be placed in the first provision of the admission agreement and in a separate agreement, plaintiffs have proffered no legislative history or other authority that this redundancy was intended by the Legislature. Nor has plaintiff suggested any prejudice that occurred by including the arbitration provision in only a separate agreement.[4]

(d) Health and Safety Code Section 1599.65 Compliance

Section 1599.65 provides in pertinent part: "Prior to or at the time of admission [to a long-term health care facility], the facility shall make reasonable efforts to communicate the content

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[4] Inclusion of the arbitration language in the admission agreement as plaintiffs argue may also violate Health and Safety Code section 1599.81's mandate that admission to the facility not be premised on agreeing to arbitration. Health and Safety Code section 1599.81 mandates that the separate arbitration form "contain space for the signature of any applicant who agrees to arbitration of disputes." (Health & Saf. Code, § 1599.81, subd. (b).) Additionally, the agreement "shall clearly indicate that agreement to arbitration is not a precondition for medical treatment or for admission to the facility." (*Id.*, subd. (a).) By having two separate documents for admission and arbitration, as Windsor had, the patient is provided the option to both sign the admission agreement (and thus receive treatment) and refuse arbitration. Given the several statutes on this subject, enacted over a period of time, the Legislature may wish to reconsider the subject.

of the contract [of admission] to, and obtain on the contract the signature of, the person who is to be admitted to the facility."

Plaintiffs contend the arbitration agreement is invalid because it was signed two weeks after Michelle's admission. Yet, the statute only requires a facility to make "a reasonable effort" to obtain a signature prior to or at the time of admission. The statute does not say that a contract signed after admission is invalid. Here, the trial court impliedly found that Windsor acted reasonably in obtaining the sister's signature on the admission and arbitration documents.

(e) Timeframe of Claims Covered by Arbitration Agreement

Plaintiffs argue that the arbitration agreement does not pertain to some of their claims because it does not apply retroactively. The arbitration agreement was signed January 3, 2012. Plaintiffs' complaint, filed on November 9, 2015, identifies "the last period of approximately four years" as the timeframe where defendants failed to properly care for Michelle. Thus, plaintiff's claims were based on facts that began approximately in November 2011, less than two months before the agreements were signed. The arbitrator is in the best position to determine whether claims based on pre- January 3, 2012 conduct are subject to arbitration.

2. Claims Against S&F are Inextricably Intertwined with the Claims Against the Other Defendants

Having determined the existence of a binding arbitration agreement, we now turn to S&F's argument on appeal that the trial court erred in not compelling arbitration of plaintiffs' claims against it. Although arbitration agreements are generally only enforceable between signatories, nonsignatories may compel a signatory to arbitrate in certain circumstances. Equitable

estoppel is one of those circumstances. "[E]quitable estoppel [is] the basis for allowing a nonsignatory to enforce an arbitration clause [when] the claims plaintiff asserts against the nonsignatory must be dependent upon, or founded in and inextricably intertwined with, the underlying contractual obligations of the agreement containing the arbitration clause." (*Goldman v. KPMG, LLP* (2009) 173 Cal.App.4th 209, 217–218 (*Goldman*); *Molecular Analytical Systems v. Ciphergen Biosystems, Inc.* (2010) 186 Cal.App.4th 696, 706 ["a nonsignatory defendant may invoke an arbitration clause to compel a signatory plaintiff to arbitrate its claims when the causes of action against the nonsignatory are 'intimately founded in and intertwined' with the underlying contract obligations"].) In other words, "allegations of interdependent and concerted misconduct by signatories and nonsignatories will justify allowing a nonsignatory to enforce an arbitration clause only . . . when the claims against the nonsignatory are 'inextricably bound up with the terms and duties of the contract the plaintiff has signed with the other defendant.' " (*Goldman, supra,* at p. 225.)

Some courts find support for this rule because "a signatory to an agreement with an arbitration clause cannot ' "have it both ways" '; the signatory 'cannot, on the one hand, seek to hold the non-signatory liable pursuant to duties imposed by the agreement, which contains an arbitration provision, but, on the other hand, deny arbitration's applicability because the defendant is a non-signatory.' " (*Goldman, supra,* 173 Cal.App.4th at p. 220.)

Here, plaintiffs sued all defendants for failing to adequately care for Michelle, which was the service Windsor contracted to provide Michelle at her admission to the nursing home. Plaintiffs alleged that Windsor improperly delegated its management

duties to S&F, who failed to ensure Michelle received proper care. Specifically, the complaint alleged that S&F "entered into a management agreement with each of its co-defendants, but nominally only with [Windsor], to operate Windsor Gardens. The terms of the management agreement provided that S&F is delegated operational control of the defendants' business at Windsor Gardens, including its Administration and Nursing Service."

Plaintiffs' allegations about the relationship among the defendants were as follows: "The management agreement with the management company (S&F) provided compensation in part based on a percentage of gross revenue which produced a management fee in excess of the reasonable cost of providing management services. This is true in part, since, despite the terms of the agreement which delegates day to day management responsibilities to S&F, in practice, defendants directed Windsor Garden to pay for its own management expenses, including to the expense of its own Administrator and the expense of Windsor Gardens' business office. Accordingly, said defendants placed their own interests in realizing a profit through the device of disguising it as an expense, ahead of the interests of their residents in receiving adequate assistance with basic activities of daily life, including assistance with hygiene and with repositioning in bed." Plaintiffs also asserted that "[d]efendants so negligently conducted themselves in reference to their duties to manage, direct and provide resources to the nursing services and to provide adequate and compliant nursing services to Michelle to promote hygiene and skin integrity, as to cause Michelle to experience personal injury."

In our view, plaintiffs alleged that S&F stood in Windsor's shoes and managed the nursing home's day to day operation in a

way that caused Windsor's patients, specifically Michelle, to be neglected. The complaint asserted that Windsor's alleged wrongs are also S&F's alleged wrongs. The allegations against Windsor and the individual defendants are so intertwined with those against S&F that it is impossible to parse them.

Laswell v. AG Seal Beach, LLC (2010) 189 Cal.App.4th 1399 (*Laswell*) is instructive here. There, the plaintiff alleged she had received improper care at a health facility and brought claims against three defendants: the health facility operator, the health facility owner, the health facility management company. (*Id*. at p. 1402.) Analogous to the facts of the present case, the operator had entered into an agreement with the management company to operate the facility, and the plaintiff had signed an agreement providing for arbitration of any disputes or claims arising from the provision of services at the facility. (*Id*. at p. 1403.) The trial court denied the defendants' petition to compel arbitration, on the ground that there were parties who were not part of the arbitration agreement and would not participate in the arbitration. (*Id.* at pp. 1403–1404.)

The Court of Appeal reversed, concluding that although the agreement was signed by a representative of the facility, the owner and the management company were entitled to enforce it against the plaintiff. (*Laswell*, *supra*, 189 Cal.App.4th at p. 1407.) The court reasoned, "the substance of [plaintiff]'s allegations is that all defendants are responsible for the improper care that she received while she resided at [the facility], demonstrating that her claims against all defendants are based on the same facts and theory and are inherently inseparable." (*Ibid.*) The court concluded the owner and the management company could enforce the arbitration agreement under a theory

of equitable estoppel. (*Ibid*.) Likewise here, plaintiffs' claims against defendants were inextricably bound.

At oral argument, plaintiffs' counsel asserted that merely showing that claims are inextricably intertwined is not enough. Counsel asserted that a nonsignatory must also demonstrate the existence of some sort of corporate or other formal relationship between a nonsignatory and the signatory to enable the former to enforce the arbitration agreement. Counsel cited *Laswell, supra*, 189 Cal.App.4th 1399 for the point. *Laswell* did involve various entities that appeared to have a corporate relationship. The *Laswell* court did not, however, state a rule that corporate relationship is required. Rather it observed, " '[I]n many cases, nonparties to arbitration agreements are allowed to enforce those agreements where there is sufficient identity of parties.' " (*Id* at p. 1406.) *Valley Casework, Inc. v. Comfort Construction, Inc.* (1999) 76 Cal.App.4th 1013 (*Valley Casework*), which *Laswell* was quoting, identified several types of relationships that allow a nonsignatory to enforce an arbitration agreement: agency, partnership, third party beneficiary relationship, and contactor/subcontractor affiliation. (*Id.,* at p. 1021.)

But both *Valley Casework* and *Laswell* also pointed to a separate basis for allowing a nonsignatory to enforce the arbitration agreement: judicial estoppel, the principle at issue here. (*Laswell, supra,* 189 Cal.App.4th at p. 1407; *Valley Casework, supra,* 76 Cal.App.4th at p. 1021.) Judicial estoppel, in this context, requires no corporate relationship. As we held in *Goldman, supra,* 173 Cal.App.4th at page 214, "The *sine qua non* for allowing a nonsignatory to enforce an arbitration clause based on equitable estoppel is that the claims the plaintiff asserts against the nonsignatory are dependent on or inextricably bound up with the contractual obligations of the agreement containing

the arbitration clause." (*Ibid.*; see *Molecular Analytical Systems v. Ciphergen Biosystems, Inc, supra,* 186 Cal.App.4th 696 [nonsignatory was licensee of signatory; no corporate relationship between the two].)

We conclude the trial court erred in denying S&F's motion to compel arbitration and reverse.[5]

DISPOSITION

The order denying S&F's petition to compel arbitration is reversed and remanded with directions for the trial court to grant S&F's petition to compel arbitration. Defendant S&F Management Co., LLC is awarded costs on appeal.

RUBIN, J.

WE CONCUR:

BIGELOW, P.J. GRIMES, J.

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[5] The trial court appears to have denied the motion to compel arbitration because S&F had not provided evidence that it was a third-party beneficiary of the arbitration agreement. We do not address that point. As we explain, we rely on principles of judicial estoppel, a point that S&F raised in its reply in the trial court when it discussed *Laswell*.