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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-637

No. COA21-766

Filed 20 September 2022

Mecklenburg County, No. 21 CVS 1201

MARIANNE GUNTER, by and through her Power of Attorney, STEPHANIE O'MADIGAN, Plaintiff,

v.

THRIVE SENIOR LIVING, LLC d/b/a THE SOCIAL AT COTSWOLD; and THE SOCIAL BY THRIVE, Defendants.

Appeal by Defendants from order entered 13 September 2021 by Judge Casey Viser in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 August 2022.

McGowan, Hood, Felder & Phillips, LLC, by Chad A. McGowan and Jordan C. Calloway, for the Plaintiff-Appellee.

Hall Booth Smith, P.C., by Erin McNeil Young, Laura Anne Gregory and Briana N. Kelly for the Defendants-Appellants.

DILLON, Judge.

¶ 1 Defendants appeal an interlocutory order denying their motion to compel arbitration.

I. Background

¶ 2 Plaintiff Marianne Gunter is a resident of a senior living facility owned and

operated by Defendants. Stephanie O'Madigan is Ms. Gunter's daughter and serves as her power of attorney.

¶ 3 Ms. Gunter was injured at the facility by another resident. She brought this action against Defendants for her injuries.

¶ 4 Defendants moved to have this matter stayed or dismissed so that Ms. Gunter's claims could be arbitrated, contending that their contractual relationship required claims thereunder to be subject to arbitration. After a hearing on the matter, the trial court denied Defendants' motion. Defendants appealed.

I. Appellate Jurisdiction

¶ 5 This appeal is from an interlocutory order. However, Defendants argue that our Court has jurisdiction to hear this appeal. Specifically, Defendants contend that the order affects a substantial right; namely, the right to have the claims decided by arbitration. Based on well-established precedent from our Court that an order denying arbitration is immediately appealable, we conclude that we have jurisdiction. *See Gay v. Saber Healthcare*, 271 N.C. App. 1, 842 S.E.2d 635 (2020).

II. Analysis

¶ 6 Defendants argue that the parties have an agreement to arbitrate disputes between them and Ms. Gunter arising from Ms. Gunter living at their facility. They point to the Resident Agreement executed by Ms. Gunter's daughter on her behalf before she moved into the facility on 29 June 2020. Defendants cite the arbitration

clause in the Agreement which provides that "all claims, disputes, demands or controversies arising out of or in any way relating to this Agreement or its breach or related to any act or omission committed by [Defendants] in connection with any services provided to [Ms. Gunter] will be submitted to binding arbitration in the State of North Carolina."

¶ 7 Public policy favors settling disputes by means of arbitration. *Cyclone Roofing v. David M. LaFave Co.*, 312 N.C. 224, 229, 321 S.E.2d 872, 876 (1984). *See also* N.C. Gen. Stat. § 1-569.3 (2020). "However, before a dispute can be settled [by arbitration], there must first exist a valid agreement to arbitrate." *Routh v. Snap-On*, 108 N.C. App. 268, 271, 423 S.E.2d 791, 794 (1992).

¶ 8 Plaintiff argues that there is no valid agreement between the parties to arbitrate because no one signed the Agreement on behalf of Defendants. Indeed, the copy of the Agreement in the record does not show that Defendants ever executed it.

¶ 9 Defendants note our Supreme Court's holding that "doubts concerning the scope of arbitrable issues will be resolved in favor of the party seeking arbitration." *Servomation v. Hickory*, 316 N.C. 543, 544, 342 S.E.2d 853, 854 (1986). However, before we get to that point, Defendants must first meet their burden of showing that a valid contract to arbitrate exists.

¶ 10 "General contract law governs the issue of the existence of an agreement to arbitrate." *Southern Spindle v. Milliken*, 53 N.C. App. 785, 786, 281 S.E.2d 734, 735

(1981). As our Supreme Court has held, "[t]he essence of any contract is a *mutual assent* of both parties to the terms of the agreement as to establish a meeting of the minds." *Snyder v. Freeman*, 300 N.C. 204, 218, 266 S.E.2d 593, 602 (1980) (emphasis added). Unlike with most types of contracts, whether there is mutual assent to arbitrate is a question for the court, not the jury. N.C. Gen. Stat. § 1-569.6(b) (2020) ("The court shall decide whether an agreement to arbitrate exists . . . ."). "[U]pon appellate review, we must determine whether there is evidence in the record supporting the trial court's findings of fact and if so, whether these findings of fact in turn support the conclusion that there was no agreement to arbitrate." *Register v. Wrightsville Health*, 271 N.C. App. 257, 264, 843 S.E.2d 464, 470 (2020).

¶ 11 Here, the trial court found that there was no mutual assent to arbitrate because Defendants never signed the agreement. However, the trial court also found that the Agreement was presented to Ms. O'Madigan by Defendants, that she signed it, and that Ms. Gunter became a resident of the facility thereafter.

¶ 12 While a party's assent to a contract may be shown by its signature, assent may be shown in other ways. *Burden v. Ryder*, 49 N.C. App. 286, 289, 271 S.E.2d 96, 97 (1980). Indeed, Plaintiff showed assent through Ms. O'Madigan's signature as well as subsequent actions; namely, Ms. Gunter moved into the facility, availing herself of Defendants' services and she (through her daughter) paid the fees to Defendants associated with her residency. And even though Defendants did not execute the

Agreement, we conclude that by their actions, Defendants assented to be bound by the terms of the Agreement. They accepted Ms. Gunter as a resident, performed obligations under the Agreement, and accepted fees from Ms. Gunter. We have held that the party that does not sign an agreement yet behaves consistently therewith is bound by the terms of the Agreement. *Burden*, 49 N.C. App. at 286, 271 S.E.2d at 96. Certainly, if the positions were reversed, we would hold Defendants bound by the arbitration clause had Plaintiffs sought arbitration.

¶ 13 We hold that the trial court's findings and other uncontradicted facts support a conclusion that the parties mutually assented to the terms of the Agreement, which includes an agreement to arbitrate disputes arising thereunder.

¶ 14 Having determined the existence of an arbitration agreement, we hold that the claims of Plaintiff against Defendant are within the scope of that agreement. *See Cyclone*, 312 N.C. at 229, 876 ("Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration[.]"). The subject matter of the Agreement concerns Ms. Gunter's residency at Defendants' facility, and the claims arise from injuries suffered by Ms. Gunter at the facility by another resident.

¶ 15 Accordingly, we reverse the trial court's order and remand the matter with instructions to stay the proceedings and compel arbitration pursuant to the Agreement.

REVERSED AND REMANDED.

Judges CARPENTER and GORE concur.

Report per Rule 30(e).