

Benjamin v Jewish Home Lifecare
2015 NY Slip Op 30742(U)
May 4, 2015
Supreme Court, New York County
Docket Number: 805026/2014
Judge: Joan B. Lobis
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

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CECIL A. BENJAMIN, as the Executor of the Estate
of ALBERTHA L. BENJAMIN, Deceased, and CECIL A.,
BENJAMIN, Individually,

Plaintiffs,

Index No. 805026/2014

-against-

Decision and Order

JEWISH HOME LIFECARE, ST. LUKE'S HOSPITAL,
ST. CABRINI NURSING HOME and ST. JOHN'S
RIVERSIDE HOSPITAL,

Defendants.

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JOAN B. LOBIS, J.S.C.:

This is a medical malpractice action. Currently, Jewish Home Lifecare ("JHL") moves to stay this malpractice litigation pending arbitration. For the reason below, the motion is denied.

Plaintiff-decedent Albertha L. Benjamin entered defendant JHL for care on July 9, 2013. The complaint alleges that plaintiff was in the exclusive care of defendants JHL, St. Luke's Hospital, St. Cabrini Nursing Home ("St. Cabrini"), and St. John's Riverside Hospital ("St. John's") from July 9, 2013, through November 16, 2013. Plaintiff passed away and shortly after her death, around January 21, 2014, Cecil A. Benjamin commenced this action individually and as executor of Ms. Benjamin's estate.

Ms. Benjamin had signed an admission agreement on July 15, 2013, several days after she entered JHL for care. Paragraph 11 states that the parties have the option of signing a

binding arbitration agreement, which is annexed to the admission agreement as exhibit A. She also signed the binding arbitration agreement on July 15, 2013. In support of the current motion, JHL relies on the signed admission and arbitration agreements. In addition, it cites a plethora of case law and statutory law in support of its contention that these agreements are binding under the federal arbitration act. Moreover, JHL cites case and statutory law for the propositions that the administrator or executor of an estate is bound by an individual's arbitration agreement and that Cecil A. Benjamin cannot proceed against defendants individually.

Plaintiffs oppose the motion. They argue that Ms. Benjamin suffered from dementia when she signed the agreement and therefore lacked the capacity to consent. They point to JHL's July 10, 2013, comprehensive visit record, which indicates, at page 4, that the Brief Interview for Mental Status ("BIMS") was "Not done. she confuse." They further note that St. Cabrini and St. John's admission records from September 10, 2013, and on October 14, 2013, respectively, refer to her dementia and confusion. As for Mr. Benjamin individually, plaintiffs contend that the arbitration agreement is not binding on him because he is not a signatory. Plaintiffs further seek a deposition of a representative of JHL to determine Ms. Benjamin's mental state when she signed the agreements as well as the circumstances surrounding the signing, including who else was present.

In reply, JHL challenges the contention that Ms. Benjamin had dementia when she signed the arbitration agreement. It points to the Social Work Quarterly Note, which indicates that a BIMS was in fact held on July 10, 2013, and that Ms. Benjamin did not manifest significant limitations at that time. It also states that her admitting diagnoses did not include a diagnosis of

dementia or impaired mental status. It finally states that Mr. Benjamin is bound by the arbitration agreement, as under EPTL § 5-4.1 he can only maintain a wrongful death action if there was a viable personal injury case and here, due to the arbitration agreement, there was not a viable case. JHL states that a deposition is unnecessary because it already has demonstrated that Ms. Benjamin had sufficient capacity to sign the agreement.

The Court heard argument on this motion on March 10, 2015. To grant the motion for a stay pending arbitration, the court must find that there was a valid agreement to arbitrate. The opposition papers raise serious questions regarding decedent's mental capacity to enter such an agreement. In light of the parties' conflicting positions regarding Ms. Benjamin's competence to sign the agreement, the Court directed the parties to submit affidavits by medical experts on this issue so that it could evaluate the need for a hearing on the issue of the voluntariness of plaintiff's consent to arbitrate. The motion was adjourned until April 15, 2015, for the submission of the expert affirmations.

JHL submits the affirmation of Dr. Brent W. Spears, a licensed New York physician who is board certified in family practice. Dr. Spears indicates that he reviewed the records and determined to a reasonable degree of medical certainty that Ms. Benjamin was of sound mind when she signed the agreement. He points to records from her NYU hospital stay, which took place immediately prior to her stay at JH. At several places in those records, Ms. Benjamin was described as "alert," and she followed the commands of the occupational therapist without difficulty. She personally signed her admission, discharge and other forms, including forms relating to her legal rights. He states that records from July 10, 2013, and July 18, 2013, show that while she was at

JHL on those dates Ms. Benjamin was able to participate in her therapy and express her understanding of the need for a treatment plan. He states there is a presumption of competence in those over 18, even for elderly individuals who enter nursing homes, and that nothing in Ms. Benjamin's records is sufficient to overcome the presumption. He contends that that her decision to go to JHL for short term rehabilitation – rather than to her home, as she originally intended – was a wise one which further evidenced her mental capacity.

Plaintiffs submit the affirmation of Dr. Kerin B. Hausknecht, a licensed New York physician who is board certified in neurology and psychiatry. Dr. Hausknecht states that he reviewed all of the medical records and bases his opinion on his training and expertise in general medicine and neurology. He additionally notes that he has treated hundreds of patients with dementia and other cognitive impairments. He points to the statement on Ms. Benjamin's admission records that she was too confused to complete a BIMS. He states that when St. Cabrini admitted her for care on September 1, 2013, it noted that she was extremely confused and disoriented, with a 0 out of 6 score in the area of cognitive ability; and that on October 14, 2013, St. Johns admitted her and noted her "as 'demented' and 'having a history of dementia.'" He states that "dementia progresses slowly and . . . does not manifest itself over the course of three or four months." He indicates that if Ms. Benjamin was in such an extreme state of dementia in September and October, she must have been severely impaired on July 15, 2013, as well.

After careful consideration, the Court concludes that Dr. Spears' affirmation is inadequate, in the face of plaintiffs' argument, to show that Ms. Benjamin was competent to sign the arbitration agreement. Though his area of specialty, family practice, may include work with

dementia patients and/or he may have training in this field, he sets forth no foundation regarding the basis of his knowledge. Though a medical expert need not be a specialist for this purpose, when he or she “opines outside of his or her area of specialization” a foundation is necessary. Tsimbler v. Fell, 123 A.D.3d 1009, 1009-10 (2nd Dep’t 2014). The portions of the NYU records JHL cites do not demonstrate the extent of Ms. Benjamin’s cognitive capacity. Moreover, the Court notes that he provides no explanation for his opinion that there is a general presumption of competence in those who enter nursing homes and this appears to be a part of the basis for his conclusion. Plaintiffs’ expert, Dr. Hausknecht, on the other hand, not only is certified in neurology but has worked with hundreds of patients with the conditions at issue here. He amply supports his conclusions by the medical records he has reviewed. Plaintiffs have set forth evidence showing Ms. Benjamin’s incompetence while JHL has not demonstrated that decedent had the capacity to enter an agreement. Indeed, the JHL expert does not raise a sufficient basis to require a hearing. Therefore, it is

ORDERED that the motion is denied.

Dated: May 4, 2015

ENTER:



JOAN E. LOBIS, J.S.C.