

Ertel v Optima Care Little Neck, LLC.
2024 NY Slip Op 35384(U)
July 30, 2024
Supreme Court, Queens County
Docket Number: Index No. 701415/2024
Judge: Tracy Catapano-Fox
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS



-----X
ALAN ERTEL, As Executor of the Estate of HENRI
ERTEL, Deceased,

Index No. 701415/2024

Plaintiff,

Part MDP

Motion Date: July 10, 2024

-against-

Calendar No. 12

OPTIMA CARE LITTLE NECK, LLC. d/b/a LITTLE
NECK CARE CENTER and ANDREW ISOPO,

Sequence No. 1

Defendants.
-----X

The following papers numbered EF-8 to EF-21 read on this motion by defendant OPTIMA CARE LITTLE NECK, LLC. d/b/a LITTLE NECK CARE CENTER for an Order dismissing plaintiff's Complaint in favor of arbitration pursuant to CPLR §7503(a) and 9 UCS §3.

Papers

Numbered

Notice of Motion, Affirmation, Exhibits.....EF8-EF18

Affirmation in Opposition, Exhibits.....EF15-EF18

Affirmation in Partial Opposition.....EF19

Reply Affirmations.....EF20-EF21

Upon the foregoing papers, it is ordered that this motion is determined as follows:

Defendant Optima Care Little Neck, LLC. d/b/a Little Neck Care Center's (hereinafter referred as "Little Neck") motion for an Order dismissing plaintiff's Complaint in favor of arbitration pursuant to CPLR §7503(a) and 9 UCS §3 is denied. Plaintiff commenced this action for medical malpractice, wrongful death and Public Health Law §2801-d violations by filing the Summons and Complaint with a Certificate of Merit on January 19, 2024. Issue was joined via the filing of co-defendant Dr. Isopo's Verified Answer on February 16, 2024. Rather than filing an Answer, defendant Little Neck makes this pre-Answer motion to dismiss and compel arbitration.

Defendant Little Neck argues that plaintiff's Complaint should be dismissed based upon the valid, binding arbitration provision in the Admission Agreement signed by plaintiff Alan Ertel

on behalf of decedent Henri Ertel on April 29, 2022. Defendant Little Neck argues that the Admission Agreement is valid and enforceable, and mandates arbitration of this action as it falls within the scope of the agreement. Defendant Little Neck presents the Admission Agreement as well as an affirmation by Michelle Cornetto in support of its motion. Cornetto affirmed she is the Director of Admissions of defendant's facility and presented the Admission Agreement to Alan Ertel on April 29, 2022 as the designated representative and Power of Attorney of decedent Henri Ertel. Cornetto further affirmed that Henri Ertel's signature and date appear on multiple pages throughout the Admission Agreement. Cornetto further affirmed that when an Admission Agreement is presented for signature, the resident or designee signing is given the opportunity to ask questions, make objections, or refuse to sign, which plaintiff did not do. Based upon the foregoing, defendant argues that plaintiff's Complaint should be dismissed in favor of arbitration.

Plaintiff opposes defendant Little Neck's motion and argues that it must be denied because defendant failed to demonstrate that decedent agreed to arbitrate disputes arising out of his admission to defendant's facility. Plaintiff further argues that the Agreement only contains the purported signature of Alan Ertel and the date he allegedly signed it, but the spaces for someone to sign on behalf of defendant's facility are blank as well as the portions on the first page indicating the date the agreement was signed and who entered into the agreement. Plaintiff further argues that rather than present a Power of Attorney, defendant merely relies upon Alan Ertel writing "POA" next to his signature on the Agreement. Plaintiff further argues that Cornetto's affirmation is insufficient to establish defendant's prima facie case. Based upon the foregoing, plaintiff argues that defendant Little Neck's motion must be denied.

Co-defendant Dr. Isopo partially opposes defendant Little Neck's motion, only to the extent that he argues that the parties should not be bifurcated into two separate forums, as that would unduly prejudice co-defendant's defense. Co-defendant argues that he is not a signatory to the Admission Agreement, but can be compelled to arbitrate as an intended third-party beneficiary. Based upon the foregoing, co-defendant argues that the parties should not be bifurcated if arbitration is compelled.

Under CPLR §7503(a), a party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. (*See Donnelly v. Teachers Fed. Credit Union*, 2024 NY Slip Op 03408 [2d Dept. 6/20/2024].) On a motion to compel or stay arbitration, the court must first determine whether the parties agreed to arbitration and, if so, whether the dispute generally falls within the scope of their arbitration agreement. (*Yeled V'Yalda Early Childhood Ctr., Inc. v. Attentive Behavior Mental Health Counseling, P.C.*, 208 A.D.3d 1209, 1210 [2d Dept. 2022].) Arbitration is a matter of contract grounded in agreement of the parties. (*Degraw Constr. Group, Inc., v. McGowan Bldrs., Inc.*, 152 A.D.3d 567, 569 [2d Dept. 2017].) Therefore, when deciding whether the parties agreed to arbitrate a certain matter, ordinary state law principles that govern the formation of contracts apply. (*Yeled V'Yalda Early Childhood Ctr.* at 1210.) In New York,

contractually negotiated arbitration clauses are not only regularly enforced, but are encouraged as part of the state's public policy. (*159 MP Corp. v. Redbridge Bedford, LLC*, 160 A.D.3d 176, 205 [2d Dept. 2018].) “Inasmuch as an arbitration clause is a contractual right, the general rule is that only a party to an arbitration agreement is bound by or may enforce the agreement. (*Degraw* at 569.)

An admission agreement to a nursing home or residential health care facility may be enforced against a resident where it was properly executed by that resident's ‘designated representative.’ (*Quaterman v. River Manor Corp.*, 219 A.D.3d 514, 515 [2d Dept. 2023].) A designated representative pursuant to 10 NYCRR §415.2(f) can occur in one of three ways, the relevant method in this action being “(iii) by family members and other parties who have an interest in the well-being of the resident who, after discussion with the facility identify the individual or individuals most personally involved in the resident's care, if the resident lacks the capacity to make such designation.” (*Id.* at 515-516.)

Defendant Little Neck failed to demonstrate a prima facie entitlement to dismissal of the action and to compel arbitration. The Admission Agreement and affirmation by Michelle Cornetto were insufficient to establish a prima facie case as the Admission Agreement was neither signed by defendant nor included the parties to be bound to the Agreement and date of enforceability. (*See Gallagher v. Long Is. Plastic Surgical Group, P.C.*, 113 A.D.3d 652, 653 [2d Dept. 2014][an unsigned contract may be enforceable if there is objective evidence establishing that the parties intended to be bound].) It is noted that the agreement is not fully executed, as the opening paragraph fails to indicate who is the resident and responsible party to the agreement, and no signatures by defendant are present in any of the documents. There is also insufficient evidence that decedent intended to be bound by the Arbitration Agreement, as defendant failed to demonstrate that Alan Ertel signed the agreement as decedent's designated representative. Further, defendant failed to include a Power of Attorney and merely relied upon the abbreviation “POA” next to Alan Ertel's signature in the agreement.

Defendant also failed to demonstrate that decedent lacked the capacity make such a designation upon admission to the facility. Cornetto's affirmation was insufficient to establish a prima facie case, as it was not made in accordance with the specific language required under CPLR §2106. (*See generally Nelson v. Lighter*, 179 A.D.3d 933 [2d Dept. 2020].) Additionally, Cornetto merely explained the general process and opportunity to ask questions, but Cornetto failed to sufficiently demonstrate the circumstances under which Alan Ertel signed the agreement. She also failed to attest to the basis for the determination that decedent lacked the capacity to designate when admitted to defendant's facility. Based upon the foregoing, defendant Little Neck failed to demonstrate a prima facie entitlement to dismissal of this action and to compel arbitration, notwithstanding the sufficiency of plaintiff and co-defendant's opposition papers.

Accordingly, defendant Optima Care Little Neck, LLC. d/b/a Little Neck Care Center's motion for an Order dismissing plaintiff's Complaint in favor of arbitration pursuant to CPLR §7503(a) and 9 UCS §3 is denied. This matter is scheduled for a Preliminary Conference on Tuesday, August 13, 2024 at 9:30am in Courtroom 48.

This constitutes the decision and Order of the Court.

Dated: July 30, 2024





Hon. Tracy Catapano-Fox, J.S.C.