2018 IL App (1st) 172427

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

FIRST DIVISION
July 23, 2018

No. 1-17-2427

JAMES KERO and PAMELA KERO, Plaintiffs, v. SHARON PALACIOS, R.N.; NORTHWESTERN MEDICINE; NORTHWESTERN MEMORIAL HOSPITAL; NORTHWESTERN MEMORIAL HEALTHCARE; and SYMPHONY OF LINCOLN PARK, LLC, Defendants, (James Kero, Plaintiff-Appellant; Symphony of Lincoln Park, LLC, Defendant-Appellee).	)	Appeal from the Circuit Court of Cook County 16 L 496 The Honorable William E. Gomolinski, Judge Presiding.

JUSTICE MIKVA delivered the judgment of the court, with opinion.
Presiding Justice Pierce and Justice Griffin concurred in the judgment and opinion.

OPINION

¶ 1 Appellant and the plaintiff in this case, James Kero, appeals from an order of the circuit court that granted a motion by one of the defendants, Symphony of Lincoln Park, LLC to compel arbitration of the negligence claims that Mr. Kero had filed against it, and denied Mr. Kero's motion to reconsider the court's prior order striking two of his claims against Symphony for intentional misconduct. On appeal, Mr. Kero argues that the court's enforcement of the arbitration agreement was wrong for two reasons: (1) Symphony was not a party to the arbitration agreement and (2) Mr. Kero signed the agreement under duress. Mr. Kero also argues

that the court improperly struck the intentional misconduct claims against Symphony and his notice of appeal references another circuit court order. For the following reasons, we affirm.

¶ 2 I. BACKGROUND

¶ 3 On June 29, 2017, Mr. Kero and his wife, Pamela Kero, who is not a party to this appeal (collectively, the Keros), filed their fourth amended complaint and the operative complaint in this appeal against Symphony and various other defendants who are not parties to this appeal—including Sharon Palacios, R.N., Northwestern Medicine, Northwestern Memorial Hospital, Northwestern Memorial Healthcare, and Yasser Farid, M.D. The factual background relevant to this appeal is as follows.

¶ 4 The Keros alleged that Mr. Kero was a patient of Symphony's rehabilitation facility in July 2016. He was injured during his stay when, on July 19, and again on July 31, 2016, he fell out of his bed. The Keros alleged two counts of negligence and two counts of intentional misconduct against Symphony. On June 30, 2017, the circuit court struck the intentional misconduct counts.

¶ 5 On July 20, 2017, Symphony filed a motion to compel arbitration and to dismiss the negligence counts of the Keros' complaint under section 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2016)). Symphony argued that a valid arbitration agreement existed between the parties, that the agreement required Mr. Kero to arbitrate claims of negligence, and that, "using its then operative name 'Imperial Grove Pavilion,' " Symphony was a party to the arbitration agreement that Mr. Kero had signed.

¶ 6 Symphony attached Mr. Kero's admission packet to the motion, which included the admission contract and the arbitration agreement. The admission contract, signed by Mr. Kero on May 12, 2016, indicates that it was between Mr. Kero as the "resident" and "The Imperial Grove

Pavilion" as the "facility." Mr. Kero's initials are on multiple pages of the contract and his name is printed and signed as the resident.

¶ 7 The "Health Care Arbitration Agreement" (arbitration agreement) lists "The Imperial Grove Pavilion" as the "facility," and then states that the facility "includes the particular facility where the Resident resides, its parents, affiliates, and subsidiary companies, owners, officers, directors, medical directors, employees, successors, assigns, agents, attorney and insurers." It further provides:

> "In the event of any claim arising out of (1) any dispute between you and us, (2) any dispute relating to services rendered for any condition, (3) injuries alleged to have been received by patient, *** (4) services rendered for any condition and arising out of the diagnosis, treatment or care of patient, and (5) collection proceedings in excess of $50,000.00, the claim will be submitted to binding arbitration pursuant to the provisions of this health care arbitration agreement.
>
> * * *
>
> Resident certifies that Resident has read this agreement and has legal representation regarding thereto or has been given the right to have this agreement reviewed by Resident's legal representation.
>
> Resident has signed this Agreement of Resident's free will and not under duress of any nature and fully accepts the terms thereof."

¶ 8 At the bottom, just above Mr. Kero's signature, the arbitration agreement states:

> "AGREEMENT TO ARBITRATE HEALTH CARE NEGLIGENCE CLAIMS

NOTICE TO PATIENT

YOU CANNOT BE REQUIRED TO SIGN THIS AGREEMENT IN ORDER TO RECEIVE TREATMENT. BY SIGNING THIS AGREEMENT, YOUR RIGHT TO TRIAL BY A JURY OR A JUDGE IN A COURT WILL BE BARRED AS TO ANY DISPUTE RELATING TO INJURIES THAT MAY RESULT FROM NEGLIGENCE DURING YOUR TREATMENT OR CARE, AND WILL BE REPLACED BY AN ARBITRATION PROCEDURE."

¶ 9 Symphony also attached affidavits from two employees: Schakota Tubbs and Laura Aranda. Ms. Tubbs averred in her affidavit that she was the former "Business Office Assistant" at Symphony. She stated that Mr. Kero executed the admission contract and arbitration agreement on May 12, 2016, and that at that time she "engaged [Mr. Kero] in conversation regarding the substance of the documents he was signing." Ms. Tubbs averred that Mr. Kero appeared to her to be "alert and oriented," "of sound mind and judgment," "capable of executing all admission documentation on his own," and "capable of understanding the terms of the admission contract and arbitration agreement." Ms. Aranda stated in her affidavit that she was the administrator of Symphony and the former administrator of Imperial Grove Pavilion. Ms. Aranda also attested that Mr. Kero executed his admission contract and arbitration agreement on May 12, 2016.

¶ 10 Both Ms. Tubbs and Ms. Aranda stated in their affidavits that: on November 1, 2015, Symphony became a licensee of the facility known as Imperial Grove Pavilion, and continued to operate under the trade name of Imperial Grove Pavilion and Imperial of Lincoln Park until May 18, 2016; that between November 1, 2015, and May 18, 2016, the facility's "building signage, marketing collateral, name badges and internal markings referred to the building as Imperial

Grove Pavilion"; that on May 18, 2016, the facility announced it was changing its operating name to Symphony of Lincoln Park. Ms. Aranda also stated that on May 18, 2016, the facility signage, awnings, name tags, contracts, and marketing materials "were updated to reflect the name Symphony." Both affiants attested that they had "personal knowledge of the facts heretofore attested to and would testify to same if sworn as a witness to testify."

¶ 11 In response to Symphony's motion to enforce arbitration and to dismiss, the Keros argued that the arbitration agreement was unenforceable both because no evidence had been presented to show that Symphony was a party to the arbitration agreement and "because of duress and the unfair bargaining positions between Symphony and Mr. Kero" when the parties signed the arbitration agreement.

¶ 12 Mr. Kero attached to his motion a printout from the Secretary of State's website, titled "LLC FILE DETAIL REPORT," listing the entity name as "SYMPHONY LINCOLN PARK LLC," indicating that the file date was April 23, 2015, and stating that "SYMPHONY OF LINCOLN PARK" was the active assumed name.

¶ 13 Mr. Kero also attached his own affidavit to his response, in which he averred that he was not told he would have to sign an arbitration agreement before he arrived at Symphony. Mr. Kero further stated in his affidavit:

> "When I arrived at Symphony of Lincoln Park to be a patient, I was given forms to sign and told that I needed to sign the forms in order to be taken as a patient. I signed the forms.
>
> When I arrived at Symphony of Lincoln Park to be a patient, I had been discharged as a patient from the hospital to receive care, therapy, and assistance in order to be able to get strong enough to go home. At that time, I could not have

gone home because of my condition.

I was transported by ambulance from the hospital to Symphony of Lincoln Park."

¶ 14 The circuit court entered an order on September 15, 2017 that (1) denied plaintiffs' motion to reconsider its previous order dismissing the intentional misconduct counts against Symphony, (2) granted Symphony's motion to "Dismiss and Enforce the Arbitration Agreement" and (3) made a finding under Rule 304(a), pursuant to motion, that there was "no just reason for delaying either enforcement or Appeal of this Order as to #2, above [(granting the motion to enforce arbitration)], or both."

¶ 15 II. JURISDICTION

¶ 16 Mr. Kero filed his notice of appeal on October 3, 2017, specifically appealing from the circuit court's orders of September 15, 2017, the order of June 30, 2017, which had granted Symphony's motion to strike the intentional misconduct counts, and also an order from May 11, 2017, with respect to prior motions to dismiss filed by Symphony, although it is unclear from what portion of that order Mr. Kero is appealing.

¶ 17 On November 7, 2017, Symphony filed a motion in this court to dismiss this action for lack of jurisdiction. After full briefing on the motion, we granted Symphony's motion on November 29, 2017, and dismissed the case for want of jurisdiction.

¶ 18 Mr. Kero filed a petition for rehearing on December 20, 2017, which we granted with respect to the dismissal of his appeal from the circuit court's order of September 15, 2017. In our order, we stated that the appeal would "proceed as an interlocutory appeal pursuant to Illinois Supreme Court Rule 307 from the circuit court's order of September 15, 2017, directing the parties to proceed to arbitration." We have jurisdiction over this appeal pursuant to Rule

307(a)(1), allowing appeals as of right from an interlocutory order of the circuit court granting or denying an injunction. See *Salsitz v. Kreiss*, 198 Ill. 2d 1, 11 (2001) ("An order of the circuit court to compel or stay arbitration is injunctive in nature and subject to interlocutory appeal under paragraph (a)(1) of [Illinois Supreme Court Rule 307].").

¶ 19 III. ANALYSIS

¶ 20 On appeal, Mr. Kero argues that the circuit court erred by (1) enforcing the arbitration agreement between him and Symphony, and (2) striking the intentional misconduct counts from the Keros' fourth amended complaint. We consider each issue in turn.

¶ 21 A. Enforceability of the Arbitration Agreement

¶ 22 Symphony filed its motion to compel arbitration and dismiss the Keros' complaint under section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2016)). On a section 2-619 motion, the defendant has the burden of proof of going forward and, if the motion is "based on facts not apparent from the face of the complaint, the movant must support its motion with affidavits or other evidence." (Internal quotation marks omitted.) *Philadelphia Indemnity Insurance Co. v. Pace Suburban Bus Service*, 2016 IL App (1st) 151659, ¶ 22; see also *Borowiec v. Gateway 2000, Inc.*, 209 Ill. 2d 376, 383 (2004). "[I]n ruling on the motion, the trial court must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party." *Id.* If the defendant is able to carry the burden of moving forward, "the burden then shifts to the plaintiff, who must establish that the affirmative defense asserted either is unfounded or requires the resolution of an essential element of material fact before it is proven." (Internal quotation marks omitted.) *Philadelphia Indemnity*, 2016 IL App (1st) 151659, ¶ 22. "The plaintiff's failure to properly contest the defendant's affidavit by submitting a counteraffidavit may be fatal to his cause of action." *Id.* We review a circuit court's ruling on a

section 2-619 motion *de novo*. *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 188 (1997).

¶ 23 The arbitration agreement specifically states that it is governed by the Federal Arbitration Act (FAA) (9 U.S.C. § 1, *et seq.* (2016)). Section 2 of the FAA provides that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2016). Our supreme court has interpreted this as a savings clause, with the purpose of "preserv[ing] general contract defenses such as lack of mutuality, lack of consideration, fraud, duress, unconscionability, and the like, that can truly apply to any contract." *Carter v. SSC Odin Operation Co.*, 237 Ill. 2d 30, 50 (2010).

¶ 24 1. Symphony Was a Party to the Arbitration Agreement

¶ 25 Mr. Kero contends that Symphony failed to provide evidence that it was a party to the arbitration agreement, which states it was between "The Imperial Grove Pavilion" and him. According to Mr. Kero, the affidavits that Symphony supplied to show that Symphony was a licensee of the Imperial Grove Pavilion facility at the time that Mr. Kero signed the arbitration agreement are insufficient because the affiants failed to offer any factual bases on which their opinions were founded, any documentary evidence to support their attestations, and any facts to show that their statements were within their personal knowledge.

¶ 26 Under Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013), any affidavits submitted in support of a motion to dismiss pursuant to section 2-619 of the Code "shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all documents upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can

testify competently thereto."

¶ 27 The affidavits submitted by Symphony in support of its motion complied with Rule 191. An affidavit satisfies the requirements of that rule "if from the document as a whole, it appears the affidavit on the personal knowledge of the affiant and there is a reasonable inference that the affiant could competently testify to its contents at trial." *Centro Medico Panamericano, Ltd. v. Laborers' Welfare Fund*, 2015 IL App (1st) 141690, ¶ 16. For example, in *Centro* this court found that the defendant's claim director "had personal knowledge of the training, instruction, and standard practice of defendants' service representatives in responding to provider calls" and that she could therefore testify to this standard practice even though she was not a party to the calls, and she could also testify as to "the common business practices within the company." *Id.* ¶ 17.

¶ 28 Similarly here, both affiants stated that they were employees at the facility to which Mr. Kero was admitted at the time of his admission. Both affiants averred that at that time Symphony was a licensee of Imperial Grove Pavilion and that shortly after Mr. Kero's arrival, the facility officially changed its operating name and signage from Imperial Grove Pavilion to Symphony of Lincoln Park. We agree with Symphony that it is reasonable to conclude that Ms. Tubbs—as a former business office assistant of Symphony—and Ms. Aranda—as an administrator of Symphony and a former administrator of Imperial Grove—would have personal knowledge of who employed them, and the nature of the relationship between their employer and the facility in which they worked. And they would certainly be competent to testify to this information if they were called as witnesses at trial.

¶ 29 Together with the admission packet itself, these affidavits provide sufficient facts to support Symphony's claim that it is, indeed, a party to the arbitration contract. In the admission

contract and the arbitration agreement, "Imperial Grove Pavillion" had been typed in as the facility. The arbitration agreement broadly defines "facility" to include Imperial Grove's "parents, affiliates, and subsidiary companies, owners, officers, directors, medical directors, employees, successors, assigns, agents, attorney and insurers." As the affidavits of Ms. Tubbs and Ms. Aranda make clear, Symphony was, at the least, a successor of Imperial Grove and was also an affiliate. The admission packet demonstrates that there was no effort to hide the fact that "facility" included "Symphony of Lincoln Park," as Mr. Kero initialed two sections of the admission contract in which "Symphony of Lincoln Park" was handwritten in as the name of the facility for the "Consent for Treatment" and the "Consent for Payment." Based on this evidence, Symphony carried its burden of showing it was a party to the arbitration agreement, thereby shifting the burden to Mr. Kero to raise an issue of fact on this issue or show that the agreement was otherwise invalid. *Philadelphia Indemnity,* 2016 IL App (1st) 151659, ¶ 22.

¶ 30 The evidence that Mr. Kero claims contradicts Symphony's showing that it was a party to the arbitration agreement was a printout from the Secretary of State's website, entitled "LLC File Detail Report" for "Symphony Lincoln Park LLC." Mr. Kero claims that this printout shows that the name Symphony of Lincoln Park is not an operating name used by any other company. However, it is not at all clear what this printout shows. And it certainly does not contradict, in any way, the affidavits of Ms. Tubbs and Ms. Aranda that show Symphony was a licensee of Imperial Grove at the time that Mr. Kero was admitted and then changed its operating name from Imperial Grove to Symphony.

¶ 31 Because Mr. Kero has failed to offer any evidence to raise a factual issue on Symphony's claim that it is a party to the arbitration agreement, the circuit court did not error in finding Symphony to be a party to the agreement.

¶ 32 2. There is No Evidence of Duress

¶ 33 Mr. Kero next contends that the circuit court should have found the arbitration agreement to be unenforceable because he signed the agreement under duress. The burden to show duress is on Mr. Kero, because once a defendant shows that a legal and binding contract existed, "the burden shifts to the plaintiff to prove it invalid by clear and convincing evidence." *Simmons v. Blauw*, 263 Ill. App. 3d 829, 832 (1994).

¶ 34 Mr. Kero argues that his affidavit establishes duress based on his attestations that "he did not have a choice about signing the arbitration contract because of the requirement of Symphony that he sign the arbitration contract or not be admitted to Symphony."

¶ 35 Our supreme court has defined "duress" as "a condition where one is induced by a wrongful act or threat of another to make a contract under circumstances which deprive him of the exercise of his free will, and it may be conceded that a contract executed under duress is voidable." *Kaplan v. Kaplan*, 25 Ill. 2d 181, 185 (1962). Implicit in a claim for duress is that the agreement would otherwise be avoided. Our supreme court in *Kaplan* stated that, with respect to a claim of duress, "the threat must be of such nature and made under such circumstances as to constitute a reasonable and adequate cause to control the will of the threatened person, and must have that effect, and the act sought to be avoided must be performed by the person while in that condition." *Kaplan*, 25 Ill. 2d at 186.

¶ 36 Here, Mr. Kero has failed to put forward any evidence of duress. According to Mr. Kero's affidavit, he was not told before he arrived at Symphony that he would have to sign an arbitration agreement and that when he did arrive, he was given forms to sign "in order to be taken as a patient." He also states that, when he came to Symphony, he had been discharged from the hospital but was not strong enough to go home because of his medical condition. The fact

that Mr. Kero was not told in advance that Symphony would give him an arbitration agreement to sign is certainly not evidence of duress. Mr. Kero does not allege that any threats were made, that he protested signing the arbitration agreement, or that he would have refused to sign the agreement. Moreover, the arbitration agreement itself states, on the final page of the arbitration agreement in all capital letters, directly above Mr. Kero's signature, that the patient cannot be required to sign the agreement in order to receive treatment. Under these circumstances, the circuit court correctly rejected Mr. Kero's claim of duress.

¶ 37 B. Mr. Kero's Remaining Appellate Claims

¶ 38 Mr. Kero also contends that the circuit court erred by dismissing his claims of intentional misconduct against Symphony, because Illinois recognizes intentional misconduct as a separate cause of action. Symphony's response is that this argument is not properly before us because, under Rule 307(a)(1), the appeal is limited to the question of whether the circuit court's order to compel arbitration was proper.

¶ 39 After we dismissed this appeal for lack of jurisdiction, we reinstated it when Mr. Kero brought a petition for rehearing based on our jurisdiction under Supreme Court Rule 307(a)(1) (eff. Nov. 1, 2016). The scope of review in a Rule 307(a)(1) appeal is quite limited: the only question before a reviewing court in such an appeal "is whether there was a sufficient showing made to the trial court to sustain its order granting or denying the interlocutory relief sought." *Postma v. Jack Brown Buick, Inc.*, 157 Ill. 2d 391, 399 (1993). In this case, that interlocutory relief was the order compelling arbitration. Our jurisdiction does not extend to the dismissal of the Keros' intentional misconduct claims against Symphony or the May 11, 2017, order referenced in Mr. Kero's notice of appeal, and we will not review those orders.

¶ 40 As a final matter, Mr. Kero asks this court to provide, in *dicta*, guidance as to the best

practice in a case such as this, where one plaintiff and one defendant go to arbitration, potentially prejudicing the plaintiff "by forcing the plaintiff and defendant to undertake discovery and present evidence away from the bulk of the case before trial," and to arbitrate "before the statute of limitations for counterclaims and cross claims has expired." We decline this invitation to provide what Mr. Kero acknowledges is *dicta* on an issue to which Symphony has not even responded.

¶ 41 IV. CONCLUSION

¶ 42 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 43 Affirmed.