

Wolf v Hollis Operating Co., LLC

2023 NY Slip Op 34711(U)

October 31, 2023

Supreme Court, Queens County

Docket Number: Index No. 716586/2020

Judge: Denis J. Butler

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DENIS J. BUTLER IAS Part 12
Justice

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WILLIAM WOLF, JR. As the Administrator
of the Estate of WILLIAM WOLF,

Index No.:
716586/2020

Plaintiff,

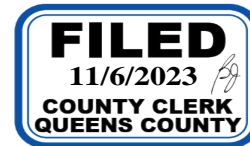
Motion Date:
May 4, 2021

-against-

Motion Seq. No.: 001

HOLLIS OPERATING CO., LLC and
KENNETH ROZENBERG,

Defendants.
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After a hearing, and upon the following papers read on this motion by defendants for an order pursuant to CPLR §§ 3211, 3212 and 7503 (a) and the Federal Arbitration Act (FAA) (9 USC § 3), compelling arbitration and staying this action pending resolution of the arbitration or dismissing this action, this motion is determined as follows:

Table with 2 columns: Papers, Numbered. Rows include Notice of Motion, Affirmation, Exhibits (E7-13), Affirmation In Opposition, Exhibits (E15-22), Reply Affirmation (E24-26).

Pursuant to a Decision and Order by the Appellate Division, Second Department (see Wolf v Hollis Operating Co., LLC, 211 AD3d 769, 771 [2d Dept 2022]), this matter was remanded to the trial court to schedule and conduct a hearing on the issue whether there was a valid agreement to arbitrate and whether plaintiff had the authority to bind plaintiff's decedent to any such agreement.

Pursuant to a Decision and Order of this Court, the hearing was scheduled for July 7, 2023. On July 6, 2023, this Court granted a mutual application by both plaintiff and defense counsel to adjourn the hearing to July 24, 2023, to continue day to day until completion.

Prior to the July 24, 2023, hearing date, counsel for defendants indicated defendants intended to call four witnesses: Ari Steinberg, Zevi Lipschitz, Stefan A. Desola and Nicole Holloman. Counsel for plaintiff indicated that Plaintiff, Mr. William Wolf, Jr., intended to testify himself as sole witness.

On July 24, 2023, counsel for defendants advised the Court that Mr. Steinberg would be the only witness whom counsel intended to call, but indicated that Mr. Steinberg was not available to testify on July 24, 2023. At the hearing, Plaintiff, Mr. William Wolf, Jr., was present in open court, so plaintiff's counsel consented to call his client out of order on July 24, 2023, despite defendants having the burden of proof at such hearing.

Plaintiff, William Wolf, Jr., testified that on or about the date decedent was admitted to defendants' health care facility, plaintiff was instructed by an administrator that in order for decedent to remain at the facility, plaintiff was required to sign paperwork, and that plaintiff was then presented with approximately nine individual sheets of paper and instructed to sign each one. At no time did the administrator review or discuss with plaintiff the contents of the pages presented to plaintiff for signature. Plaintiff conceded at the hearing that he held a valid power of attorney on behalf of decedent at the time he signed the papers and a copy of said power of attorney was entered into evidence on consent of the parties.

Plaintiff further testified that it was only after he signed the approximately nine individual sheets, that plaintiff was presented with a copy of the "admission agreement," which was blank and did not contain any signatures or information indicating that the admission agreement given to plaintiff pertained to the admission of plaintiff's decedent. A copy of the admission agreement given to plaintiff was entered into evidence on consent of the parties.

The Court finds that plaintiff, Mr. William Wolf, Jr.'s testimony was credible.

Following plaintiff's testimony, the Court proceeded to adjourn the hearing to July 25, 2023, to allow defense counsel additional time to secure Mr. Steinberg's attendance.

On July 25, 2023, counsel for both sides appeared in Court, at which time counsel for defendants advised the Court that Mr. Steinberg remained unavailable to testify, and that defendant now had an additional witness they intended to call, Karyn Mankowitz, who was also not present nor available.

Plaintiff moved to close the hearing on the ground the Court ordered the hearing to continue day to day until completion and that defense counsel had two prior adjournments to secure his witness' attendance, but failed to do so. Plaintiff, however, did not object to defendants calling both Mr. Steinberg and Ms. Mankowitz in the event the Court granted defendant's additional adjournment request. The Court proceeded to adjourn the hearing to August 29, 2023, to give defendants a final opportunity to secure their witnesses' attendance at such hearing.

On August 29, 2023, defendants called Ms. Karyn Mankowitz, for the sole purpose of admitting into evidence the documents signed by plaintiff on decedent's behalf. However, defendants failed to demonstrate that Ms. Mankowitz, as Director of Centralized Admissions for non-party Centers Health Care, is a fact witness who could lay a proper foundation establishing the authenticity of the admission documents allegedly presented to and signed by plaintiff.

On August 29, 2023, defense counsel also called Mr. Ahron ("Ari") Steinberg to testify at such hearing. Mr. Steinberg's testimony continued on August 31, 2023. Mr. Steinberg testified that he never met plaintiff before the hearing and also denied he was present when plaintiff allegedly signed the "admission agreement" on decedent's behalf. Mr. Steinberg further testified he has never reviewed the "admission agreement" presented to and signed by Plaintiff, Mr. Wolf and admitted into evidence at the hearing.

The Court finds that Mr. Steinberg's testimony was also credible.

After calling the two defense witnesses, counsel for defendant rested.

Counsel for plaintiff and defendant appeared before the Court on September 7, 2023 for oral argument and summations in the matter. The Court permitted the respective counsel to submit memorandum of law to the Court on or before September 21, 2023, which both counsel requested and complied with.

"A party seeking to compel arbitration must establish the existence of a valid agreement to arbitrate'" (id., quoting Matter of Cusimano v Berita Realty, LLC, 103 AD3d 720, 721 [2d Dept 2013]). Where, as here, a party has signed an instrument containing an arbitration agreement on behalf of another, the movant must submit evidence of "the instrument through which the plaintiff allegedly derived his authority to bind the decedent to arbitration" (Wolf v Hollis Operating Co., LLC, 211 AD3d 769, 771),

as mere representations "that [plaintiff] held a power of attorney when signing the [A]dmission [A]greement [is] insufficient to establish that [plaintiff], in fact, held such authority as a matter of law (id.).

The evidence presented at the hearing, including the power of attorney instrument which plaintiff concedes was in effect and valid at the time he signed the documents at issue, demonstrated that plaintiff held a valid power of attorney to sign the documents at issue herein on decedent's behalf.

Defendants, however, failed to demonstrate that a valid agreement to arbitrate existed between the parties. Defendants failed to execute the Admission Agreement, the Admission Agreement failed to indicate by what authority plaintiff signed the Admission Agreement on decedent's behalf, and the section of the Admission Agreement titled "Arbitration Agreement" was left blank where the admitted resident's name (i.e., the decedent) was required to be indicated. Arbitration is a matter of contract "grounded in agreement of the parties" (County of Sullivan v Edward L. Nezelek, Inc., 42 NY2d 123, 128 [1977]; see Matter of Long Island Power Auth. Hurricane Sandy Litig., 165 AD3d 1138 [2d Dept 2018]), and since the "Arbitration Agreement" is missing necessary terms (see generally Total Telecom Group Corp. v Kendal on Hudson, 157 AD3d 746, 747 [2d Dept 2018]), and the Admission Agreement was not executed by defendants, or by plaintiff upon proof of the necessary authority, the Court finds there was never a valid agreement between the parties binding them to arbitration.

Furthermore, defendant failed to rebut plaintiff's credible testimony denying that plaintiff was given, and/or explained, the contents of the Admission Agreement prior to plaintiff signing the documents at issue herein. The testimony given by Mr. Steinberg, defendant's witness, did not contradict plaintiff's testimony, as Mr. Steinberg testified that he had never met plaintiff prior to the hearing and was not present when plaintiff allegedly signed the documents at issue. The Court, having the opportunity to observe the witness' testimony, their demeanor, and their mannerisms, credits the testimony given by plaintiff that the admission agreement was not provided, and/or explained, to plaintiff prior to plaintiff being given documents to sign, and thus "there is no [credible] evidence that [plaintiff] was ever made aware of [the arbitration agreement], or consented to its terms" prior to signing it (Sherrod v Mount Sinai St. Luke's, 204 AD3d 1053, 1059 [2d Dept 2022]).

The arbitration clause is also unenforceable on the ground defendants failed to explain the admission agreement prior to handing plaintiff documents to sign, and by requiring plaintiff to

sign the agreement to arbitrate as a condition of decedent's admission, in violation of 42 CFR §§ 483.70(n)(1) and (n)(2).

As such, it is

ORDERED that the motion by defendants seeking to compel arbitration and staying this action pending resolution of said arbitration or dismissing this action, is DENIED.

This constitutes the Decision and Order of the Court.

Dated: October 30, 2023



Denis J. Butler, J.S.C.

