Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D74609
A/sw

_____AD3d_____ Argued - January 30, 2024

ANGELA G. IANNACCI, J.P.
JOSEPH J. MALTESE
HELEN VOUTSINAS
CARL J. LANDICINO, JJ.

2022-04291 DECISION & ORDER

Shirley Bergman, etc., appellant, v Rosalind and Joseph Gurwin Jewish Geriatric Center of Long Island, Inc., et al., respondents.

(Index No. 726167/21)

Leitner Varughese Warywoda PLLC, Melville, NY (Nicholas E. Warywoda of counsel), for appellant.

Rubin Paterniti Gonzalez Rizzo Kaufman LLP, New York, NY (Jonathan Waldauer of counsel), for respondents.

In an action to recover damages for personal injuries, the plaintiff appeals from an order of the Supreme Court, Queens County (Frederick D.R. Sampson, J.), dated May 17, 2022. The order granted that branch of the defendants' motion which was pursuant to CPLR 7503(a) to compel arbitration and to stay the litigation pending resolution of the arbitration and denied the plaintiff's cross-motion to amend the complaint and caption to add Ruth Graber as a plaintiff.

ORDERED that the order is reversed, on the law and in the exercise of discretion, with costs, that branch of the defendants' motion which was pursuant to CPLR 7503(a) to compel arbitration and to stay the litigation pending the resolution of the arbitration is denied, and the plaintiff's cross-motion to amend the complaint and caption to add Ruth Graber as a plaintiff is granted.

In May 2021, following a stroke and a hospital stay, Rose Kirszenweig (hereinafter the resident) was admitted to a nursing facility owned and operated by the defendants. Upon admission, the plaintiff, who is the resident's daughter, signed the nursing facility's admission

agreement, which contained an arbitration provision.

In November 2021, the plaintiff commenced this action on behalf of the resident to recover damages for personal injuries the resident allegedly sustained after she fell multiple times in the nursing facility. The complaint alleged that the defendants' negligence led to the resident's falls and resulting injuries. After interposing an answer, the defendants moved pursuant to CPLR 7503(a) to compel arbitration and to stay the litigation pending the resolution of arbitration, or in the alternative, to change the venue of the action. The plaintiff opposed the motion and cross-moved to amend the complaint and caption to add Ruth Graber as a plaintiff. Graber, the resident's other daughter, and the plaintiff were appointed co-agents pursuant to a power of attorney executed by the resident.

By order dated May 17, 2022, the Supreme Court granted that branch of the defendants' motion which was pursuant to CPLR 7503(a) to compel arbitration and to stay the litigation pending resolution of the arbitration and denied the plaintiff's cross-motion to amend the complaint and caption to add Graber as a plaintiff. The plaintiff appeals.

"A party seeking to compel arbitration must establish the existence of a valid agreement to arbitrate" (*DiGregorio v Long Is. Univ.*, 221 AD3d 780, 781 [internal quotation marks omitted]). Here, the defendants failed to meet that burden because they did not submit sufficient evidence of the plaintiff's authority to bind the resident to arbitration at the time the plaintiff signed the admission agreement on the resident's behalf (*see Wolf v Hollis Operating Co., LLC*, 211 AD3d 769, 770-771). The defendants failed to submit the power of attorney through which the plaintiff allegedly derived authority to bind the resident to arbitration (*see id.* at 771; *cf. Sunshine Care Corp. v Warrick*, 100 AD3d 981, 981-982). In support of their motion, the defendants submitted, inter alia, the affidavit of Joanne Parisi, vice president and administrator of the defendant The Rosalind and Joseph Gurwin Jewish Geriatric Center of Long Island, Inc. (hereinafter the nursing home), and a copy of the admission agreement, which Parisi referred to as having been "entered into between [the nursing home] and [the plaintiff], as power of attorney for [the resident]." However, the admission agreement did not indicate that it was signed by the plaintiff on the resident's behalf pursuant to a power of attorney. Parisi, who did not sign the admission agreement on behalf of the nursing home, did not aver that she had personal knowledge of the circumstances surrounding the execution of the agreement or that the nursing home had ever been provided a copy of the power of attorney or otherwise explain the basis for her conclusory statement that the plaintiff had signed the admission agreement pursuant to a power of attorney (*see generally Sherrod v Mount Sinai St. Luke's*, 204 AD3d 1053, 1054). Moreover, the defendants did not submit an affidavit from the individual who signed the admission agreement on their behalf or anyone else claiming to have personal knowledge regarding its execution by the plaintiff.

Further, the power of attorney, submitted by the plaintiff in opposition to the defendants' motion, explicitly required the plaintiff and Graber to act together in carrying out the responsibilities of the power of attorney, and the defendants do not dispute that Graber never signed the admission agreement.

Accordingly, the Supreme Court should have denied that branch of the defendants' motion which was pursuant to CPLR 7503(a) to compel arbitration and to stay the litigation pending resolution of the arbitration (*see Matter of Jalas v Halperin*, 85 AD3d 1178, 1181-1182).

"Leave to amend a pleading should be freely given provided that the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit" (*Bhatara v Kolaj*, 222 AD3d 926, 929 [citation and internal quotation marks omitted]; *see Spodek v Neiss*, 104 AD3d 758, 759). "The burden of demonstrating prejudice or surprise, or that a proposed amendment is palpably insufficient or patently devoid of merit, falls upon the party opposing the motion" (*Wilmington Sav. Fund Socy., FSB v Sotomayor*, 222 AD3d 702, 703 [internal quotation marks omitted]).

Here, the Supreme Court improvidently exercised its discretion in denying the plaintiff's cross-motion for leave to amend the complaint and caption to add Graber as a plaintiff. The defendants failed to demonstrate that they would be prejudiced or surprised by this amendment (*see Garafola v Wing Inc. Specialty Trades*, 139 AD3d 793, 793-794; *Buckley v Richie Knop, Inc.*, 40 AD3d 794, 796).

We do not reach the issues the defendants raise with respect to that branch of their motion which was to change venue, as those issues were not addressed in the order appealed from and, thus, remain pending and undecided (*see Katz v Katz*, 68 AD2d 536, 542-543).

The parties' remaining contentions are without merit.

IANNACCI, J.P., MALTESE, VOUTSINAS and LANDICINO, JJ., concur.

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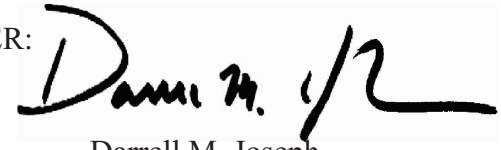

Darrell M. Joseph
Clerk of the Court