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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

JAMES NAGEL,

Plaintiff and Respondent,

v.

NAPA NURSING CENTER, INC., et al.,

Defendants and Appellants.

No. A134947

(Napa County
Super. Ct. No. 26-57005)

Plaintiff James Nagel sued defendants Napa Nursing Center, Inc. (Napa Nursing Center), Horizon West HealthCare, Inc., and Horizon West HealthCare of California, Inc. seeking recovery of damages for wrongful death, negligence, elder abuse, and violation of patients' rights in connection with Napa Nursing Center's treatment of his deceased mother, Betty Nagel. Defendants appeal from the court's order denying their petition to stay the action and compel arbitration of plaintiff's claims against them. (Code Civ. Proc.,¹ § 1294.) Defendants contend that Nagel signed an arbitration agreement to forgo a civil trial on malpractice claims, and that the arbitration clauses in question substantially complied with the requirements of section 1295, subdivisions (a) and (b). We affirm the order denying defendants' petition to compel arbitration because, in our independent view, Nagel did not sign an agreement to arbitrate.

¹ Unless otherwise indicated all further statutory references are to the Code of Civil Procedure.

I. FACTUAL AND PROCEDURAL BACKGROUND

Eighty-six-year-old Betty Nagel was admitted to Napa Nursing Center on April 28, 2009. The next day, Napa Nursing Center sent Nagel, Betty’s son, an arbitration agreement by fax. The faxed document was entirely in black and white.

The arbitration agreement recited in article 1, clause 1.6 that “By signing this arbitration agreement below, the parties agree to be bound by the provisions of this Arbitration Agreement. The Resident (or his/her legal representative and/or Agent) *acknowledges that he or she has the option of not signing this arbitration agreement and not being bound by the arbitration provisions contained herein.* The execution of this arbitration agreement is not a precondition to receiving medical treatment or for admission to the Community.” (Italics added.)

Articles II, III, and IV of the arbitration agreement set forth the parties, the terms of the waiver of jury trial, and rescission. Article V, consisting of clauses 5.1 and 5.2, is entitled “EXECUTION.” Clause 5.1 states:

“The parties to the Arbitration Agreement hereby *acknowledge and agree that, upon execution, any and all disputes or claims as to medical malpractice* (that is, whether any medical services rendered during the Resident’s admission were necessary or unauthorized or were improperly, negligently or incompetently rendered) *will be determined by submission to neutral arbitration* as provided by California law, and not by a lawsuit or court process, except as California law provides for judicial review of arbitration proceedings. Such arbitration will be governed by this Arbitration Agreement.

“NOTICE: BY SIGNING THIS CONTRACT YOU ARE AGREEING TO HAVE ANY ISSUE OF MEDICAL MALPRACTICE DECIDED BY NEUTRAL ARBITRATION AND YOU ARE GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL. SEE ARTICLE 1 OF THIS CONTRACT.

“Date: _____
Resident

“By virtue of Resident’s consent, instruction, and/or durable power of attorney, I hereby certify that I am authorized to act as Resident’s agent in executing and delivering

or her authorized legal representative or agent a color copy of the arbitration agreement. A color copy of the agreement was “given to James Nagel to sign, and [was] maintained in the facility’s business file for Betty Nagel.” However, a separate signed copy of the agreement was faxed to the facility on April 30, 2009 by Nagel and was also maintained in the facility’s business file for Betty Nagel.

In a declaration filed along with an opposition to the motion, Nagel averred the only copy of the arbitration agreement he received was the one in black and white that was faxed to him, and he “signed the portion that I was authorized to act as the resident’s agent, but I did not sign either 5.1 or 5.2 of the Arbitration Agreements.”

Following argument, the court denied the motion to compel arbitration.

As relevant here, the court ruled: “The only portion of the arbitration agreement that was signed by plaintiff is to certify that he was authorized to act as the decedent’s agent in executing and delivering the agreement. He did not sign the provisions, on behalf of the resident, agreeing to arbitrate either the medical malpractice claims or others. While Napa Nursing may well have intended for the agent signature to suffice for an agreement to arbitrate, it nevertheless remains unclear as to whether plaintiff shared in that intention. In fact, plaintiff’s declaration under penalty of perjury indicates otherwise. [¶] While it is true . . . that doubts regarding the scope of an arbitration clause should be resolved in favor of arbitration, ‘[t]here is no public policy favoring arbitration of disputes which the parties have not agreed to arbitrate.’ (*Engineers & Architects Assn. v. Community Development Dept.* (1994) 30 Cal.App.4th 644, 653.) ‘A party can be compelled to arbitration only when he or she has agreed in writing to do so.’ (*County of Contra Costa v. Kaiser Foundation Health Plan, Inc.* (1996) 47 Cal.App.4th 237, 244–245.) Here, the court is unable to conclude that plaintiff agreed to arbitrate his claims.”

This appeal followed.

II. DISCUSSION

We review the trial court’s denial of defendants’ motion to compel de novo.

“ “[W]hen a petition to compel arbitration is filed and accompanied by prima facie evidence of a written agreement to arbitrate the controversy, the court itself must

determine whether the agreement exists and, if any defense to its enforcement is raised, whether it is enforceable.” ’ [Citations.] As the party seeking to compel arbitration, [defendants] had the burden of proving the existence of an enforceable arbitration agreement. [Citations.] Where, as here, the relevant facts are undisputed, on appeal, we independently determine whether such an agreement exists.” (*Rodriguez v. Superior Court* (2009) 176 Cal.App.4th 1461, 1469.)

Here, the parties’ arguments center on whether the arbitration agreement faxed between Nagel and the Napa Nursing Center substantially complied with the requirements of section 1295² and, if so, whether such compliance saves the contract. However, we need not resolve questions about the scope and effect of compliance or noncompliance with section 1295 because, in our view, the threshold question—whether Nagel signed the agreement presented to him by Napa Nursing Center—must be resolved against defendants, notwithstanding their compliance or noncompliance with the statute.

“We view the cited clauses in light of the standard rules of contract interpretation. ‘An interpretation which gives effect is preferred to one which makes void.’ (Civ. Code, § 3541.) If it may be done without violating the parties’ intent, we must interpret the

² Section 1295 provides in relevant part: “(a) Any contract for medical services which contains a provision for arbitration of any dispute as to professional negligence of a health care provider shall have such provision as the first article of the contract and shall be expressed in the following language: ‘It is understood that any dispute as to medical malpractice, that is as to whether any medical services rendered under this contract were unnecessary or unauthorized or were improperly, negligently or incompetently rendered, will be determined by submission to arbitration as provided by California law, and not by a lawsuit or resort to court process except as California law provides for judicial review of arbitration proceedings. Both parties to this contract, by entering into it, are giving up their constitutional right to have any such dispute decided in a court of law before a jury, and instead are accepting the use of arbitration.’

[¶] (b) Immediately before the signature line provided for the individual contracting for the medical services must appear the following *in at least 10-point bold red type*: [¶] ‘NOTICE: BY SIGNING THIS CONTRACT YOU ARE AGREEING TO HAVE ANY ISSUE OF MEDICAL MALPRACTICE DECIDED BY NEUTRAL ARBITRATION AND YOU ARE GIVING UP YOUR RIGHT TO A JURY OR COURT TRIAL. SEE ARTICLE 1 OF THIS CONTRACT.’ ” (Italics added.)

contract in such a way as to make it ‘lawful, operative, definite, reasonable, and capable of being carried into effect.’ (Civ. Code, § 1643.)” (*24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1214.) Nevertheless, “[e]very contract requires consenting parties [M]utual consent is gathered from the reasonable meaning of the words and acts of the parties, and not from their unexpressed intentions or understanding.” (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 116, p. 155.) Moreover, “any ambiguities caused by the draftsman of the contract must be resolved against that party.” (*Neal v. State Farm Ins. Cos.* (1961) 188 Cal.App.2d 690, 695.)

Viewing the contract clauses here objectively, and construing their plain language liberally (1 Witkin, *supra*, § 140, at p. 180), we note, first, that article 1, clause 1.6 of the arbitration agreement appears to anticipate some type of signature by the resident or his or her legal representative on the arbitration agreement, whether or not they actually agreed to arbitration. While clause 1.6 states “[b]y signing this arbitration agreement below,” the parties agree to be bound by it, the same clause also states the resident, or his or her legal representative or agent, “acknowledges that he or she has the option of not signing this arbitration agreement.” Although clause 1.6 did not state the acknowledgement needed to be in writing, in the context of a formal, written arbitration agreement, it was not unreasonable for the parties to expect the acknowledgement was to be given in writing. Despite this, no signature line was provided for a resident who declined to accept arbitration. A resident had no way to acknowledge the option not to sign without signing the agreement.

Second, under article 2, clause 2.1, the parties to the agreement included the resident, Betty Nagel, or her legal representative or agent, leading one to reasonably expect that either the resident, or the legal representative or agent, could sign the actual agreement to arbitrate that was recited under article V, in clause 5.1, even though only the word “Resident” was printed under the first signature line.

Finally, the clause immediately preceding Nagel’s signature did *not* require him to “acknowledge and agree that, upon execution, any and all disputes or claims as to

medical malpractice . . . will be determined by submission to neutral arbitration.” Instead, the provision Nagel executed merely asked him to “*certify that I am authorized to act as Resident’s agent in executing and delivering of this arbitration agreement.*” (Italics added.) Especially in light of article 1, clause 1.6 of the arbitration agreement, which appears to anticipate some type of signature on the document acknowledging the option not to agree, we cannot construe Nagel’s signature on this line to constitute an agreement to arbitrate, rather than a simple certification of his status as legal representative. Certainly, the language of the clause Nagel signed did not reasonably apprise him that, in addition to certifying his representative status and acknowledging that he could, on Betty’s behalf, agree or not agree to arbitration, he was also agreeing on her behalf to submit any future malpractice claims to arbitration.³ On the contrary, because language to that effect was found in the clause he elected *not* to sign, he could reasonably have assumed he had made no such agreement.

Defendants argue the first signature line, under which was written “RESIDENT,” was to be used if the agreement was signed by the resident himself or herself, while the second signature line, under which was written “Legal Representative/Agent (if any),” was to be used if the agreement was signed on the resident’s behalf. Regardless, it is argued, both signature lines were intended as an endorsement of the entire section, rather than only the immediately preceding text. In this reading, the second signature line merely included an affirmation of the representative’s authority, in addition to the agreement to arbitrate.

While this may have been the legal effect intended by defendants, it is not the legal effect objectively communicated by the agreement. Because the agreement contained separate signature lines under the two separate paragraphs of text, there was no reason for Nagel to conclude he was agreeing to more than the immediately preceding

³ While this conclusion is consistent with Nagel’s testimony in his declaration regarding his understanding of the agreement, we are not relying on Nagel’s subjective impression in reaching this conclusion. Rather, our conclusion is based solely on the text and layout of the agreement.

paragraph, which related directly to his status as legal representative. As discussed above, because the parties to the agreement expressly included the resident or her legal representative, a signatory could reasonably expect that either could execute the first signature line, even though only the word “Resident” was printed under it. At a minimum, the agreement was ambiguous in this regard, and we are required to construe an ambiguity against the draftsman, in this case defendants. (*Neal v. State Farm Ins. Cos.*, *supra*, 188 Cal.App.2d at p. 695.)

Given the contract language drafted by defendants, we are compelled to agree with the trial court that Nagel did not sign on the only line in the entire contract which would have signaled his unambiguous intent to submit any malpractice claims to arbitration. “While Napa Nursing may well have intended for the agent signature to suffice for an agreement to arbitrate, it nevertheless remains unclear as to whether plaintiff shared in that intention.” The motion to compel arbitration was properly denied.

III. DISPOSITION

The order denying defendant’s motion to compel arbitration is affirmed.

Margulies, Acting P.J.

We concur:

Dondero, J.

Banke, J.