NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5372-12T2

MINNIE PEARL BROWN, by
and through her ATTORNEY-IN-FACT,
JIMMY HALL, POA,

Plaintiff-Appellant,

v.

5101 NORTH PARK DRIVE OPERATIONS,
LLC, and/or GENESIS NJ HOLDINGS, LLC,
and/or GENESIS OPERATIONS, LLC, and/or
GHC HOLDINGS, LLC, and/or FC-GEN
OPERATIONS INVESTMENT, LLC, and/or
GENESIS HEALTHCARE LLC d/b/a COOPER
RIVER WEST NURSING HOME,

Defendants-Respondents.

Argued January 7, 2014 – Decided April 23, 2014

Before Judges Messano and Hayden.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Docket No. L-4740-12.

Tommie Ann Gibney argued the cause for appellant (Andres & Berger, P.C., attorneys; Ms. Gibney, of counsel and on the brief).

Sharon K. Galpern argued the cause for respondents (Stahl & DeLaurentis, P.C., attorneys; Ms. Galpern, on the brief).

PER CURIAM

Plaintiff Minnie Pearl Brown, through her attorney-in-fact Jimmy Hall, appeals from the June 24, 2013 Law Division order dismissing without prejudice her complaint against defendant Cooper River West Nursing Home (Cooper River West), a Genesis Health Care facility, and ordering the parties to proceed to binding arbitration. After a review of the facts and applicable legal principles, we reverse and remand for further proceedings.

We discern the following facts from the record. On June 5, 2007, Brown executed a power of attorney (POA) naming Hall, her son, as her attorney-in-fact because she was having health and memory issues. The POA's grant of authority enabled Hall "to do each and every act which [Brown] could personally do" and was to remain in effect regardless of disability.

On September 24, 2010, Brown suffered a stroke, which led to her hospitalization at Cooper Hospital. On September 28, 2010,[1] Brown was transferred to Cooper River West in Pennsauken for rehabilitation. On October 20, 2010, Hall signed numerous admissions documents as Brown's attorney-in-fact, including the admission agreement, a representative designation, and a voluntary binding arbitration agreement.

According to Hall, he was approached by Cooper River West staff as he was leaving from a visit with his mother and told

[1] Admissions documents reflect an October 9, 2010 admission date.

that he had to sign some documents. He was then escorted to a family conference room where a woman he believed was from the Cooper River West business office presented him with a stack of papers. The woman then told Hall that "if [he] did not sign the[] papers, [his] mother could not stay at Cooper River West and that [he] would have to find another place for her to stay." Hall asserted that she flipped through the documents and simply pointed out where he was to sign. Thinking he had no other option, Hall stated that he signed the documents without reading them, without receiving any explanation as to their contents or his rights pertaining thereto, and only because he was compelled to do so.

According to Kelly Grimaldi, the Marketing and Admissions Director at Cooper River West in 2010, following Brown's admission, she contacted Hall numerous times to set up an appointment for him to complete the requisite admissions documents. Grimaldi averred that Hall completed the documents pursuant to a scheduled appointment in which she thoroughly reviewed all of the paperwork with him. Grimaldi explicitly recalled covering the arbitration agreement and explaining to Hall that the document was entirely voluntary. Grimaldi claimed that she never told Hall that failure to sign the arbitration agreement would result in denial of care to Brown.

Subsequently, Brown sustained injuries allegedly caused by negligent care while she was a resident at Cooper River West. Hall filed a civil complaint on Brown's behalf seeking compensatory and punitive damages in November 2012. Defendants answered the complaint and later filed a motion to dismiss and proceed to binding arbitration on April 26, 2013.

After hearing oral argument on the motion, on June 21, 2013, the judge dismissed the case and ordered the parties to proceed to arbitration. This appeal ensued.

On appeal, Hall argues that the judge erred in granting summary judgment in light of the conflicting facts and the lack of discovery. He submits that the arbitration agreement is procedurally and substantively unconscionable. Further, Hall contends that he did not have the authority under the POA to bind Brown to the terms of the arbitration agreement. We are convinced that Hall did have the power to bind Brown to the arbitration agreement; however, as questions of material fact relating to the potential unconscionability of the agreement exist, we reverse and remand for further proceedings.

The trial judge dismissed the complaint on the basis of a Rule 4:6-2(e) motion to dismiss, which was converted into a Rule 4:46-2 motion for summary judgment after the submission of certifications. R. 4:6-2. When deciding a motion for summary

judgment, the court must take all reasonable inferences in the light most favorable to the non-moving party and only grant the motion where "no genuine issue as to any material fact" exists and "the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). On review of the grant of summary judgment, we utilize "'the same standard [of review] that governs the trial court.'" Mem'l Props., LLC v. Zurich Am. Ins. Co., 210 N.J. 512, 524 (2012) (alteration in original) (quoting Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 330 (2010)).

We begin by reviewing the well-established principles that govern our analysis. Arbitration "'is a favored means of dispute resolution.'" Cole v. Jersey City Med. Ctr., 215 N.J. 265, 276 (2013) (quoting Hojnowski v. Vans Skate Park, 187 N.J. 323, 342 (2006)). The New Jersey Arbitration Act, N.J.S.A. 2A:23B-1 to -32, like its federal counterpart, 9 U.S.C.A. § 2 of the Federal Arbitration Act (FAA), provides that an arbitration "agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract." N.J.S.A. 2A:23B-6(a).

Because nursing home agreements involve interstate commerce, arbitration provisions contained therein are governed by the FAA. Estate of Anna Ruszala ex rel. Mizerak v. Brookdale

Living Cmtys., Inc., 415 N.J. Super. 272, 292 (App. Div. 2010). Thus, the FAA preempts the anti-arbitration provision contained in N.J.S.A. 30:13-8.1. Id. at 293. A mandatory arbitration provision in a nursing home or assisted living facility agreement is generally enforceable. See Marmet Health Care Ctr., Inc. v. Brown, __ U.S. __, __, 132 S. Ct. 1201, 1203-04, 182 L. Ed. 2d 42, 45-46 (2012).

However, because an arbitration agreement is a contract, even under the FAA, state courts apply "'the legal rules governing the construction of contracts.'" Cole, supra, 215 N.J. at 276 (quoting McKeeby v. Arthur, 7 N.J. 174, 181 (1951)). The existence of a valid arbitration agreement is "a 'gateway' question that requires judicial resolution." Muhammad v. Cnty. Bank of Rehoboth Beach, Del., 189 N.J. 1, 12 (2006), cert. denied, 549 U.S. 1338, 127 S. Ct. 2032, 167 L. Ed. 2d 763 (2007). "[A]n agreement to arbitrate must be the product of mutual assent, as determined under customary principles of contract law." NAACP of Camden Cnty. E. v. Foulke Mgmt. Corp., 421 N.J. Super. 404, 424 (App. Div.), certif. granted, 209 N.J. 96 (2011), appeal dismissed, 213 N.J. 47 (2013). Thus, the ordinary contract defenses, such as fraud, duress, or unconscionability may be raised to invalidate an arbitration

agreement without contravening the FAA. Muhammad, supra, 189 N.J. at 12.

"[B]ecause arbitration provisions are often embedded in contracts of adhesion, courts take particular care in assuring the knowing assent of both parties to arbitrate, and a clear mutual understanding of the ramifications of that assent." NAACP of Camden Cnty. E., supra, 421 N.J. Super. at 425. As we previously stated:

> Contracts of adhesion are unique. "[T]he essential nature of a contract of adhesion is that it is presented on a take-it-or-leave-it basis, commonly in a standardized printed form, without opportunity for the adhering party to negotiate except perhaps on a few particulars." A contract of adhesion is "[a] contract where one party . . . must accept or reject the contract . . . ."
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> [Moore v. Woman to Woman Obstetrics & Gynecology, L.L.C., 416 N.J. Super. 30, 38 (App. Div. 2010) (alterations in original) (quoting Rudbart v. N. Jersey Dist. Water Supply Comm'n, 127 N.J. 344, 353, cert. denied, 506 U.S. 871, 113 S. Ct. 203, 121 L. Ed. 2d 145 (1992))].

Upon a finding that a contract is a contract of adhesion, the next step is to engage in a "sharpened inquiry" concerning unconscionability by applying four factors set forth in Rudbart, supra, 127 N.J. at 356, to determine the enforceability of the agreement. Muhammad, supra, 189 N.J. at 15-16. These factors include "the subject matter of the contract, the parties'

relative bargaining positions, the degree of economic compulsion motivating the 'adhering' party, and the public interests affected by the contract." Rudbart, supra, 127 N.J. at 356.

There are two types of unconscionability, procedural and substantive. Delta Funding Corp. v. Harris, 189 N.J. 28, 55 (2006) (Zazzali, J., concurring in part and dissenting in part) (citing Sitogum Holdings, Inc. v. Ropes, 352 N.J. Super. 555, 564 (Ch. Div. 2002)). Procedural unconscionability "'can include a variety of inadequacies, such as age, literacy, lack of sophistication, hidden or unduly complex contract terms, bargaining tactics, and the particular setting existing during the contract formation process.'" Ibid. Substantive unconscionability "'simply suggests the exchange of obligations so one-sided as to shock the court's conscience.'" Ibid. This determination is made "using a sliding scale analysis," considering "the way in which the contract was formed and, further, whether enforcement of the contract implicates matters of public interest." Stelluti v. Casapenn Enters., LLC, 203 N.J. 286, 301 (2010). Due to this sliding scale analysis, a claim of unconscionability can prevail when "one form of it, e.g., procedural unconscionability, is greatly exceeded, while the other form of it, e.g., substantive unconscionability, is only marginally exceeded." Muhammad v. Cnty. Bank of Rehoboth

Beach, Del., 379 N.J. Super. 222, 237 (App. Div. 2005) (citing Ropes, supra, 352 N.J. Super. at 565-67), rev'd on other grounds, 189 N.J. 1 (2006), cert. denied, 549 U.S. 1338, 127 S. Ct. 2032, 167 L. Ed. 2d 763 (2007). The burden of proving the defense of unconscionability is on the party challenging the enforceability of the agreement. Martindale v. Sandvik, Inc., 173 N.J. 76, 91 (2002).

On the record before us, defendants were not entitled to summary judgment as a matter of law on the question of unconscionability. The parties fiercely dispute the manner in which the arbitration agreement was executed, the intent of the parties, and the level of Hall's sophistication. The parties submitted dueling certifications, which could not be more divergent. As the question of whether the arbitration agreement was unconscionable is a fact-sensitive determination, see Ropes, supra, 352 N.J. Super. at 564, summary judgment on this issue was inappropriate. See Mem'l Props., LLC, supra, 210 N.J. at 524. The paucity of undisputed material facts precludes us from making the necessary fact-sensitive inquiry into the unconscionability issue and from making a knowing inquiry into the application of the four Rudbart factors. Accordingly, we are constrained to reverse the summary judgment order and remand to the trial court for further proceedings.

We reach a different conclusion concerning the judge's decision that Hall had the requisite authority as Brown's attorney-in-fact to enter into the agreement. "'A power of attorney is an instrument in writing by which one person, as principal, appoints another as his agent and confers upon him the authority to perform certain specified acts or kinds of acts on behalf of the principal.'" AMB Prop., LP v. Penn Am. Ins. Co., 418 N.J. Super. 441, 456 (App. Div. 2011) (quoting Kisselbach v. Cnty. of Camden, 271 N.J. Super. 558, 564 (App. Div. 1994)); see also N.J.S.A. 46:2B-8.2(a) (defining POA as "written instrument by which an individual known as the principal authorizes another individual . . . known as the attorney-in-fact to perform specified acts on behalf of the principal as the principal's agent"). A power of attorney "should be construed in accordance with the rules for interpreting written instruments generally." Kisselbach, supra, 271 N.J. Super. at 564.

"Generally, an agent may only bind his principal for such acts that 'are within his actual or apparent authority.'" N.J. Lawyers' Fund for Client Prot. v. Stewart Title Guar. Co., 203 N.J. 208, 220 (2010) (quoting Carlson v. Hannah, 6 N.J. 202, 212 (1951)). "Actual authority occurs when, at the time of taking action that has legal consequences for the principal, the agent

reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act." Ibid. (internal quotation marks and citation omitted). On the other hand, apparent authority occurs "when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." Ibid. (internal quotation marks and citation omitted). The inquiry into whether the agent possesses apparent authority focuses on what the third party reasonably expected. Ibid. Thus, "'a court must examine the totality of the circumstances to determine whether an agency relationship existed even though the principal did not have direct control over the agent.'" Ibid. (quoting Sears Mortg. Corp. v. Rose, 134 N.J. 326, 338 (1993)).

Here, the June 5, 2007 POA granted Hall the actual authority to "sign [Brown's] name on [her] behalf and to . . . make, execute and acknowledge all contracts . . . which may be requisite or proper to effectuate any matter or thing appertaining to or belonging to [Brown.]" The POA also authorized Hall to bring lawsuits on Brown's behalf, appear on her behalf, and "compromise, release, or compound any [legal] claim or demand." Thus, despite Hall's assertion that he had previously only taken action as to Brown's financial matters, he

had the actual authority to sign the arbitration agreement on her behalf. Moreover, in reading the broad grant of power provided in the POA, Cooper River West's expectation that Hall had such power would have been entirely reasonable.

The order granting summary judgment and dismissing Brown's complaint against defendants is reversed. This matter is remanded to the trial court for further proceedings. We do not retain jurisdiction.