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This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5168-15T2

JANET D'AUTRECHY SUMMERS, Individually, and as Executor of the ESTATE OF JOSEPH P. D'AUTRECHY, JR., Deceased, and EMMA J. D'AUTRECHY,

Plaintiffs-Respondents,

v.

SCO, SILVER CARE OPERATIONS, LLC d/b/a ALARIS HEALTH AT CHERRY HILL,

Defendants,

and

CARE ONE AT MOORESTOWN, LLC d/b/a CARE ONE AT MOORESTOWN,

Defendant-Appellant,

and

THE LAKEWOOD OF VOORHEES OPERATOR, LLC d/b/a THE VOORHEES CARE AND REHABILITATION CENTER,

Defendant-Respondent.

Argued December 11, 2017 – Decided May 21, 2018

Before Judges Messano and O'Connor.

On appeal from Superior Court of New Jersey, Law Division, Camden County, Docket No. L-1303-16.

Joel I. Fishbein argued the cause for appellant Care One at Moorestown, LLC (Litchfield Cavo, LLP, attorneys; Joel I. Fishbein and Zachary Danner, on the brief).

Leonard G. Villari argued the cause for respondents Janet D' Autrehcy Summers, Estate of Joseph P. D'Autrechy, Jr., and Emma J. D'Autrechy (Villari, Lentz & Lynam, LLC, attorneys; Thomas A. Lynam and Leonard G. Villari, on the brief).

Gibley and McWilliams attorneys for respondent The Lakewood of Voorhees Operator, LLC, join in the brief of appellant Care One at Moorestown, LLC.

PER CURIAM

In this wrongful death and survival action, defendant Care One at Moorestown, LLC (Care One) appeals from a July 22, 2016 order denying its motion to compel plaintiffs' claims against it be submitted to arbitration. We affirm.

I

Joseph D'Autrechy (decedent) suffered from pressure wounds on his legs and was admitted to Care One for rehabilitative treatment. On the day of his admission, plaintiff Janet

D'Autrechy[1], who is decedent's daughter and the executor of his estate, signed a preprinted form entitled "Admission Agreement" (agreement). Beneath the line on which she signed her name appear the words "Responsible Party's Signature." The agreement defines "responsible party" as the "authorized agent of the [r]esident with legal access, or can obtain legal access, to the [r]esident's income, assets and resources and consents to be bound by this [a]greement."

Notwithstanding the fact plaintiff signed the agreement as the responsible party, she indicated in the agreement decedent had not given her a power of attorney. There is no evidence plaintiff was decedent's "authorized agent" at the time she signed this document. In fact, Care One has conceded plaintiff did not have decedent's actual authority to sign the agreement, and it is not contending she exhibited apparent authority to act on decedent's behalf.

Both at the time of and during his sixty-three day admission, decedent was mentally competent. Although the agreement clearly provides the resident is to sign the agreement in addition to the "responsible party," and that there is no

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[1] There are three plaintiffs. They are Janet D'Autrechy, the decedent's estate, and Emma J. D'Autrechy, who is decedent's widow. For the balance of this opinion, Janet D'Autrechy shall be referred to as plaintiff.

question decedent had the mental capacity to understand and execute this document, he was never presented with and never signed it.

There is an arbitration clause in the agreement, which states in pertinent part:

> Any controversy or claim arising out of or relating to this agreement and brought by the resident, his/her personal representatives, heirs, attorneys or the responsible party shall be submitted to binding arbitration by a single arbitrator selected and administered pursuant to the commercial arbitration rules of the American Arbitration Association. . . . Any claimant contemplated by this paragraph hereby waives any and all rights to bring any such claim or controversy in any manner not expressly set forth in this paragraph, including, but not limited to, the right to a jury trial.

According to plaintiffs' complaint, months after decedent was discharged from Care One he died of septic shock secondary to the pressure ulcers, allegedly caused by the negligent treatment provided by Care One and its employees, as well as other defendants. After it was served with the complaint, Care One promptly moved to enforce the arbitration clause in the agreement, arguing all of plaintiffs' claims against it had to be submitted to arbitration in accordance with the arbitration clause. On July 22, 2016, the trial court entered an order denying the motion, finding the arbitration clause could not be

enforced because the agreement containing such clause was never formed.

II

On appeal, Care One contends the trial court erred when it declined to enforce the arbitration clause. Its principal arguments are the arbitration clause "should be compelled because the Federal Arbitration Act [, 9 U.S.C. §§ 1 to -16,] favors arbitration," and the doctrine of equitable estoppel precludes plaintiffs from disavowing the existence of the agreement. As for the latter argument, Care One contends decedent benefitted from the provisions in the agreement, in which Care One promised to provide him with room, board, nursing services, therapy, mediations, and assistance with the activities of daily living while in its facility; therefore, the terms of the agreement must be enforced.

Care One also argues the question of whether the agreement is enforceable should have been decided by an arbitrator and not the court. Care One does not address the trial court's finding decedent never assented to the subject agreement and thus it cannot be enforced because it never came into existence.

We first address whether an arbitrator or judge decides whether a contract containing an arbitration clause has been formed. The Federal Arbitration Act (FAA) "preempts state laws

that single out and invalidate arbitration agreements." Roach v. BM Motoring, LLC, 228 N.J. 163, 174 (2017) (citing Doctor's Assocs. v. Casarotto, 517 U.S. 681, 687 (1996)). In light of the supremacy of the FAA, we routinely consult federal decisional authority for guidance in the area of arbitration jurisprudence, see Linden Bd. of Educ. v. Linden Educ. Ass'n ex rel. Mizichko, 202 N.J. 268, 280 (2010) (quoting N.J. Tpk. Auth. v. Local 196, I.F.P.T.E., 190 N.J. 283, 292 (2007)), and we did not hesitate to do so here. Because relevant to our analysis, we first cite pertinent language from Section 2 of the FAA:

> A written provision in . . . a contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.
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> [9 U.S.C. § 2 (emphasis added).]

In Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 444 (2006), the United States Supreme Court discussed the above-cited language. The Court observed "[c]hallenges to the validity of arbitration agreements 'upon such grounds as exist at law or in equity for the revocation of any contract' can be divided into two types. One type challenges specifically the

validity of the agreement to arbitrate." Ibid. (citing Southland Corp. v. Keating, 465 U.S. 1, 4-5 (1984)).

The second type "challenges the contract as a whole, either on a ground that directly affects the entire agreement (e.g., the agreement was fraudulently induced), or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid." Ibid. Because the Court was not required to render a decision on the second kind of challenge, the Court expressly stated it was not disturbing the holdings of certain federal court opinions that addressed the scope of the second type of challenge. Id. at 444 n. 1. These opinions included Chastain v. Robinson-Humphrey Co., 957 F.2d 851 (11th Cir. 1992) and Sandvik AB v. Advent Int'l Corp., 220 F.3d 99 (3d Cir. 2000).

In Chastain, the court determined a court must decide the question whether a party signed a contract containing an arbitration provision. Chastain, 957 F.2d at 854-55. The Sandvik court held a court, not an arbitrator, must examine a person's signatory authority, because an agreement to a contract "is a necessary prerequisite to the court's fulfilling its role of determining whether the dispute is one for an arbitrator to decide under the terms of the arbitration agreement." Sandvik, 220 F.3d at 107.

These federal circuit opinions remain good law. In addition, since Buckeye, the Supreme Court again recognized the issue of a contract's validity is different from the issue of whether a contract was ever concluded in the first place. In Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 291-92 (2010), the Court addressed a challenge to an arbitration clause in a contract. In its opinion the Court noted: "[i]t is similarly well settled that where the dispute at issue concerns contract formation, the dispute is generally for courts to decide." Id. at 296. Accordingly, here, it was appropriate for the trial court to retain jurisdiction and decide the issue whether an agreement between decedent and Care One ever come into existence.

To determine if a contract has been formed, a court must apply "ordinary state-law principles that govern the formation of contracts." Kirleis v. Dickie, McCamey & Chilcote, 560 F.3d 156, 160 (3d Cir. 2009). In New Jersey, it is well-established that, among other things, an agreement must be the product of mutual assent, "as determined under customary principles of contract law." Atalese v. U.S. Legal Serv. Grp., LP, 219 N.J. 430, 442 (2014) (quoting NAACP of Camden Cty. E. v. Foulke Mgmt., 421 N.J. Super. 404, 424 (App. Div. 2011)). Further, the party seeking to prove the existence of a contract bears the

burden of proving the other party or parties to the alleged contract assented to its terms. <u>See</u> <u>Midland Funding LLC v. Bordeaux</u>, 447 N.J. Super. 330, 336 (App. Div. 2016).

Here, the trial court determined the parties never entered into the subject agreement, a finding well-supported by the facts. Decedent never reviewed or signed the agreement. Plaintiff did not have the authority to enter into the agreement on decedent's behalf when she signed the agreement, a fact Care One does not even dispute.

Care One contends principles of equitable estoppel bar plaintiffs from disavowing the existence of the contract. To establish equitable estoppel, Care One must prove decedent engaged in conduct, either intentionally or under circumstances that induced reliance, and that Care One acted or changed its position to its detriment. <u>See</u> <u>Knorr v. Smeal</u>, 178 N.J. 169, 178 (2003). Equitable estoppel requires detrimental reliance. <u>See</u> <u>ibid.</u> Care One's argues decedent induced Care One to provide him with nursing care, therapy, medications, room and board, assistance in daily living and other provisions, and that decedent did so to Care One's detriment; therefore, the agreement should be enforced. We disagree.

First, Care One knew decedent neither reviewed nor signed the agreement. Second, when plaintiff signed the agreement,

Care One knew decedent had not executed a power of attorney appointing plaintiff as his attorney-in-fact. Care One knew or should have known plaintiff was not decedent's authorized agent when she signed the agreement. Therefore, there is no evidence either decedent or plaintiff induced Care One to engage in any action to its detriment.

Third, it is not disputed Medicare compensated Care One for the services and provisions provided to decedent. Care One claimed Medicare would not have reimbursed it but for plaintiff's signature on the agreement, but Care One did not provide evidence to support such assertion. Therefore, we reject as unsupported Care One's position the doctrine of equitable estoppel made the subject agreement a binding contract between it and decedent.

Finally, Care One's claim the arbitration clause must be enforced because the FAA favors arbitration is without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION