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NO. COA10-594
NORTH CAROLINA COURT OF APPEALS

Filed: 3 May 2011

SARAH WILLIAMSON,
ADMINISTRATRIX OF THE ESTATE OF
JAMES WARD CARVER,
Plaintiff,

v.

Bertie County
No. 09 CVS 314

WINDSOR HOUSE ONE, LLC, THIRD
STREET MANAGEMENT, LLC, and
CHARLES E. TREFZGER, JR.,
Defendants.

Appeal by Defendants from Order entered 15 March 2010 by Judge Cy A. Grant in Bertie County Superior Court. Heard in the Court of Appeals 17 November 2010.

Gugenheim Law Offices, P.C., by Stephen J. Gugenheim and Jonathan R. Harris, for plaintiff-appellee.

Bell, Davis & Pitt, P.A., by Michael D. Phillips, for defendant-appellants.

HUNTER, JR., Robert N., Judge.

Windsor House One, LLC, Third Street Management, LLC, and Charles E. Trefzger, Jr. ("Defendants") appeal the trial court's

Order denying Defendants' Motion to Dismiss or, in the Alternative, to Compel Arbitration. We affirm the Order.

I. Factual & Procedural Background

On 21 February 2008, Sarah Williamson ("Williamson") contacted the Pasquotank County Department of Social Services ("DSS") to report that her father, James Ward Carver, was no longer able to care for himself. Mr. Carver refused to eat, bathe, groom himself, or take his medications. Williamson also reported that her father was suffering from dementia, tended to wander from his home, and refused to accept the assistance of his family members.

DSS responded by sending Paulette McCoy, a social worker, to Mr. Carver's home on the same day. After interviewing Mr. Carver and following an emergency examination by a physician, DSS determined that Mr. Carver was in need of protective services. On 22 February 2008, DSS filed a Petition for Order Authorizing Emergency Services. That day, Magistrate Stephen R. Masters granted an Order Authorizing Emergency Services. The Order provided that DSS "is hereby authorized to furnish and provide such services as are reasonably necessary for James Carver pursuant to the provisions of N.C. Gen. Stat. § 108A-106, including the removal of James Carver from his residence in the

discretion of the Petitioner." DSS immediately placed Mr. Carver in an adult care home in Elizabeth City, North Carolina.

On 28 February 2008, Chief District Court Judge C. Christopher Bean signed an Order extending the 22 February 2008 Emergency Order, appointing a Guardian ad Litem for Mr. Carver, and ordering DSS to provide emergency services for Mr. Carver as defined under N.C. Gen. Stat. § 108A-106.

On 7 March 2008, District Court Judge Eula E. Reid entered an Order Authorizing Protective Services permitting DSS to provide Mr. Carver with protective services pursuant to N.C. Gen. Stat. § 108A-105. Judge Reid subsequently amended the Order on 21 April 2008, to include the provision that the court recommended Mr. Carver be maintained in an extended care facility near Elizabeth City in order that his family could visit him on a regular basis.

On 11 March 2008, DSS Director, Melissa C. Stokely ("Director Stokely" or "Stokely"), executed a Delegation of Authority ("DOA") authorizing several members of her staff, including DSS Supervisor Carolyn Thomas ("Thomas"), to act as Stokely's representative pursuant to N.C. Gen. Stat. § 108A-14(b). By the terms of the DOA, Director Stokely delegated to Thomas the authority to

act on [her] behalf in signing written release of information forms related to any minor or adult of whom [she is] legal

custodian or legal guardian, to sign any forms giving [her] consent for the administration of medication or treatment (to include surgery) for any minor or adult of whom [she is] legal custodian or legal guardian. This includes the authority to give verbal or telephone consent for the release of information, the administration of medication and/or treatment, including surgery, for any minor or adult of whom [she is] the legal custodian or legal guardian. The above-cited delegation of authority is valid to the extent that orders of the Courts delegate such authority to [her] in [her] position as Director of Pasquotank County Department of Social Services.

During February and March 2008, Mr. Carver was admitted to three different adult care homes, a nursing home, and the hospital as his needs fluctuated. On 28 March 2008, Thomas placed Mr. Carver at Windsor House, in Windsor, North Carolina. At the time of admission, Windsor House presented Thomas with a set of documents, which Thomas signed in her capacity as the representative of Director Stokely. These documents included a dispute resolution agreement, which provided Mr. Carver, his estate, successors, assigns, heirs, personal representatives, executors, and administrators agreed to submit all legal claims against Windsor House, or its officers, directors, managers, employees, or agents to binding arbitration and to waive his constitutional right to a trial by jury. Mr. Carver did not sign the Dispute Resolution Agreement.

Mr. Carver was declared incompetent on 1 May 2008 by the district court, Plaintiff was appointed as Mr. Carver's General Guardian, and DSS closed its case on Mr. Carver. On 27 May 2008, Mr. Carver fell in the shower and hit his head on the floor. He was taken to the hospital, found to have suffered a fracture to his vertebrae, diagnosed with quadriplegia, and died on 3 June 2008.

Plaintiff, as administratrix of her father's estate, filed this suit in Bertie County Superior Court on 30 July 2009 alleging negligence, medical negligence, and wrongful death against Windsor House One, LLC, which owns Windsor House; Charles E. Trefzger, Jr., an officer of Windsor House One; and Third Street Management, LLC, which provides management services to Windsor House. Prior to filing an answer, Defendants filed a Motion to Dismiss or, in the Alternative, to Compel Arbitration and Stay Litigation based on the Dispute Resolution Agreement signed by Thomas and Windsor House. Plaintiff opposed Defendants' Motion alleging neither Director Stokely nor Thomas had actual or apparent authority to bind Mr. Carver to an arbitration agreement.

On 15 March 2010, the Superior Court entered an Order dismissing Defendant's Motion. The trial court found the arbitration agreement was void as a matter of law. The trial court concluded that Director Stokely did not authorize Thomas

to sign arbitration agreements on her behalf, and that neither DSS nor Thomas had the legal authority to sign the Dispute Resolution Agreement. From this Order, Defendants appeal.

II. Jurisdiction and Standard of Review

While the trial court's dismissal of Defendants' motion to compel arbitration is an interlocutory order, "[t]he right to arbitrate a claim is a substantial right which may be lost if review is delayed, and an order denying arbitration is therefore immediately appealable." *United States Trust Co., N.A. v. Stanford Group Co.*, 199 N.C. App. 287, 289-90, 681 S.E.2d 512, 514 (2009) (citations and quotation marks omitted). Therefore, this appeal is properly before this Court. We review the trial court's order *de novo*. See *Bass v. Pinnacle Custom Homes, Inc.*, 163 N.C. App. 171, 175, 592 S.E.2d 606, 609 ("The trial court's conclusion regarding a motion to compel arbitration is reviewable *de novo*."), *disc. review denied*, 358 N.C. 542, 598 S.E.2d 381 (2004).

III. Analysis

Defendants argue the trial court erred in concluding Director Stokely did not authorize Thomas to act on her behalf to sign arbitration agreements for Mr. Carver. Defendants argue the trial court "narrowly construed" Director Stokely's Delegation of Authority in a manner that is not supported by the evidence. We disagree.

In support of their argument, Defendants point to Director Stokely's sworn Affidavit, in which she states, in part, she authorized Thomas "to admit Carver to Windsor House and to sign on my behalf all documents required for Carver's admission to Windsor House, including . . . [the] Dispute Resolution Agreement." Director Stokely further averred, "Thomas was acting within the scope of her authority . . . when she signed the documents necessary for Carver's admission to Windsor House." Defendants maintain this affidavit leaves "no doubt" that Thomas had actual and apparent authority to execute all contracts necessary for Carver's admission to Windsor House.

Whether Director Stokely delegated to Thomas the authority to sign the arbitration agreement, however, is a conclusion of law to be determined by a court of law, not by Director Stokely. *See Lemon v. Combs*, 164 N.C. App. 615, 622, 596 S.E.2d 344, 349 (2004) ("Statements in affidavits as to opinion, belief, or conclusions of law are of no effect.") (citations omitted).

Actual authority may be either express or implied. *Munn v. Haymount Rehab. & Nursing Ctr., Inc.*, ___ N.C. App. ___, ___, 704 S.E.2d 290, 295 (2010). If a principal has delegated authority to her agent by words authorizing certain acts, then such authority is express authority. 3 Am. Jur. 2d *Agency* § 70 (2002). Furthermore, express authority is "conferred upon the agent or employee in express terms, and *it extends only to such*

powers as the principal gives the agent in direct terms, with the express provisions controlling." *Id.* (internal citations omitted) (emphasis added).

The express provisions of the DOA make clear that Director Stokely did not delegate such authority to Thomas. Stokely begins the DOA by quoting section 108A-14(b) of our General Statutes: "The director may delegate to one or more members of his staff the authority to act as his representative. The director *may limit the delegated authority of his representative to specific tasks* or areas of expertise." N.C. Gen. Stat. § 108A-14(b) (2009) (emphasis added.) Stokely then explicitly limited Thomas' authority stating, Thomas could "sign[] written release of information forms," could "sign any forms giving [her] consent for the administration of medication or treatment (to include surgery)," and could "give verbal or telephone consent" for the same. Nowhere in the DOA does she give Thomas the authority to sign arbitration agreements. Accordingly, Stokely did not delegate to Thomas actual authority to sign the Dispute Resolution Agreement.

Nor did Thomas have apparent authority to sign arbitration agreements on behalf of Directory Stokely. "Apparent authority is that authority which the principal has held the agent out as possessing or which he has permitted the agent to represent that he possesses." *Munn*, ___ N.C. App. at ___, 704 S.E.2d at 295

(citation and quotation marks omitted). A third party may not establish that a transaction between the agent and the third party was authorized by the principal absent actual reliance by the third party on the principal's assertions of the agent's authority at the time of the transaction. *Knight Pub. Co., Inc. v. Chase Manhattan Bank, N.A.*, 125 N.C. App. 1, 15, 479 S.E.2d 478, 487 (1997). Furthermore, reliance by the third party must result from the third party's exercise of reasonable care in determining what authority the principal conferred upon her agent. *Munn*, ___ N.C. App. at ___, 704 S.E.2d at 295. Representations made by Thomas, if any, as to her authority to sign the arbitration agreement are irrelevant. *Id.* at ___, 704 S.E.2d at 296 ("The scope of an agent's apparent authority is determined not by the agent's own representations but by the manifestations of authority which the principal accords to him." (citation and quotation marks omitted)).

Defendants acknowledge Thomas presented the DOA to Windsor House at the time of Mr. Carver's admission. As the text of the DOA expressly limits Thomas' authority to consent to "release of information" forms and "administration of medications and treatment (including surgery)," we conclude any reliance by Windsor House on the DOA for believing Thomas had authority to sign the Dispute Resolution Agreement was not the result of reasonable care. Consequently, we conclude Thomas did not have

apparent authority to sign the Dispute Resolution Agreement and Defendants' arguments are dismissed.

IV. Conclusion

Because we have determined that Carolyn Thomas did not have actual or apparent authority to enter into the Dispute Resolution Agreement at the time of Mr. Carver's admission to Windsor House, we do not reach the issue of whether Director Stokely had such authority to delegate. The trial court's order is

Affirmed.

Judges STEELMAN and STEPHENS concur.

Report per Rule 30(e).