IN THE SUPREME COURT OF MISSISSIPPI

MANHATTAN NURSING & REHABILITATION CENTER, LLC, ET AL.	**APPELLANTS,**
V.	**NO. 2007-CA-01775**
IRA SIMMONS,	**APPELLEE**

REBUTTAL BRIEF OF THE APPELLANTS

Appeal from the Circuit Court For Hinds County
The Hon. Bobby B. DeLaughter Presiding
No. 251-05-433 CIV

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ORAL ARGUMENT IS REQUESTED

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INTRODUCTION

This is a case based on allegations that Elsie Fidelia Simmons sustained injury resulting from deficiencies in the care rendered to her at Appellants' nursing facility in Jackson, Manhattan Nursing and Rehabilitation Center. Appellants, the defendants below, moved to compel arbitration pursuant to an Arbitration Agreement signed by Ira Simmons, a son of Ms. Simmons and her agent under a durable power of attorney. The Circuit Court for Hinds County denied the motion, though, finding that Mr. Simmons lacked the authority necessary to bind his mother to the Arbitration Agreement and further that he was not estopped from challenging it even though he sued for breach of the greater healthcare-services contract containing the same. This appeal arises from the lower court's order on that motion.

In response to Appellants' principal Brief, Mr. Simmons filed his own Brief advancing several arguments against the Arbitration Agreement, which Appellants ask this Court to enforce. As Appellants understand it, Mr. Simmons argues that the Circuit Court's ruling should be affirmed because: 1) the record does not show that appellant Manhattan Nursing and Rehabilitation Center, LLC, the licensed operator of the subject facility, ever assented to the Arbitration Agreement so as to make a valid contract of it; 2) he lacked the authority necessary to bind his mother, Ms. Simmons, to the Arbitration Agreement; and 3) he is not estopped from challenging the Arbitration Agreement.

Appellants respectfully submit that each of Mr. Simmons' arguments is without merit and should be rejected. Appellants again request that this Court reverse the Circuit Court's order denying enforcement of the Arbitration Agreement and remand this case with instructions to enforce that contract. Appellants further explain these contentions below.

ARGUMENTS

1. Assent to the contract.

In his Brief, Ira Simmons argues essentially that the Arbitration Agreement is void for lack of mutual assent because no representative of the nursing facility signed the same. He argues in turn that the Arbitration Agreement, with only his signature, was no more than a mere offer to arbitrate, which offer he revoked later by letter. As explained below, Appellants submit that these arguments are mistaken.

Appellant Manhattan Nursing and Rehabilitation Center, LLC, ("Appellant Manhattan"), the licensed operator of the subject facility, assented to the Arbitration Agreement through its conduct in offering the Arbitration Agreement to Mr. Simmons and in later moving the lower court to enforce that contract. In Mississippi,

> "Ordinarily one of the acts forming part of the execution of a written contract is the signing of it, and the mere fact that a written instrument purports to be an agreement does not constitute it a binding contract where it is not signed. However, signature is not always essential to the binding force of an agreement, and whether a writing constitutes a binding contract even though it is not signed or whether the signing of the instrument is a condition precedent to its becoming a binding contract usually depends on the intention of the parties. The object of a signature is to show mutuality or assent, *but these facts may be shown in other ways, as, for example, by the acts or conduct of the parties.*"

Turney v. Marion County Bd. of Educ., 481 So.2d 770, 774 (Miss. 1985) (quoting *McInnis v. Southeastern Automatic Sprinkler Co.*, 233 So.2d 219 (Miss.1970)) (italics added).

In the case *sub judice*, the relevant facts are not disputed. According to Mr. Simmons, Elsie Fidelia Simmons had been a resident of the subject facility since 2001, and in July of 2003 the ownership of the facility changed, whereupon Appellant Manhattan began to operate the facility. (T.R., p. 42, at ¶1).[1] Roughly two months later, in September of 2003, the facility

[1] References to the technical record are denominated "T.R."

presented to Mr. Simmons certain admission documents relating to the new ownership and operation of the facility, including the Arbitration Agreement. (*Id.*, at ¶2). The persons identified as parties to the Arbitration Agreement are "Manhattan Nursing + Rehab [sic]," the appellant here known as Appellant Manhattan, and "Ira Simmons," the Appellee. (T.R., p. 50). Mr. Simmons admits that he signed the Arbitration Agreement, (T.R., p. 43, at ¶3), and, on January 17, 2006, Appellant Manhattan responded to Mr. Simmons' complaint by moving the circuit court to enforce the Arbitration Agreement. (T.R., pp. 19-22). Only *after* all Appellants had already moved to compel arbitration did Mr. Simmons, on November 10, 2006, notify Appellant Manhattan of his intent to rescind his "offer to arbitrate ... disputes against defendant Manhattan Nursing & Rehab, related to Elsie Fidelia Simmons..." (T.R., p. 52).

The foregoing facts refute Mr. Simmons' argument that Appellant Manhattan failed to assent to the Arbitration Agreement. First, Appellant Manhattan was *a party* to the Arbitration Agreement. Again, Mr. Simmons very own letter reflects as much, and the face of that contract shows so as well with its identification of Appellant Manhattan as one of its parties. Second, it is simply wrong to say that Mr. Simmons "offered" the Arbitration Agreement once he signed it. The Arbitration did not originate with Mr. Simmons; rather, he admits that Appellant Manhattan "presented" the contract to him. Thus, it was Appellant Manhattan that offered the Arbitration Agreement, and by signing it Mr. Simmons accepted the offer. Third, because it was a party to the Arbitration Agreement, which it offered to Mr. Simmons, Appellant Manhattan verified its assent to its own Arbitration Agreement when it later moved the lower court to enforce the obligations of that contract not only upon itself but also upon Mr. Simmons.

In all of these facts, Appellant Manhattan's assent is evident. Again, "[t]he object of a signature is to show mutuality or assent, but these facts may be shown in other ways, as, for

example, *by the acts or conduct of the parties.*" *Turney v. Marion County Bd. of Educ.*, 481 So.2d at 774 (italics added). Here, as the true offeror of the Arbitration Agreement, Appellant Manhattan's act of presenting that contract for Mr. Simmons' signature and then moving to enforce that contract clearly show Manhattan's assent. Indeed, what clearer evidence of one's assent to a contract can there be but to ask a court to enforce that contract upon oneself and the other party to the same? The Supreme Court of Tennessee has held that, when a party takes legal action to enforce a contract, its assent to the contract is evident. *Staubach Retail Services-Southeast, LLC v. H.G. Hill Realty Co.,* 160 S.W.3d 521, 525 (Tenn. 2005) ("Although Staubach did not sign the brokerage agreement, its assent to the agreement is demonstrated by its action to enforce the agreement."). Again, Appellant Manhattan's assent to the Arbitration Agreement is clear, and Mr. Simmons' argument is without merit.[2]

Mr. Simmons' argument is also flawed insofar as he takes the position that a signature on an arbitration agreement is the best proof of the signor's assent to the contract. The case law is replete, however, with case after case in which plaintiffs signed arbitration agreements but later argued essentially that they did not know what they had signed and therefore essentially did not assent to the contract. See *McKenzie Check Advance of Mississippi, LLC v. Hardy*, 866 So.2d 446, 455 (¶31) (Miss. 2004); *United Credit Corp. v. Hubbard*, 905 So.2d 1176, 1178 (¶10) (Miss. 2004); *Cleveland v. Mann*, 942 So.2d 108, 114 (¶17) (Miss. 2006). From these cases, it might well be concluded that there is no "best" method of establishing a party's assent to a contract. But, it is also true that there is no talismanic magic about a signature on an arbitration agreement that precludes all questions about the signor's assent.

And, here again the merit of Appellant Manhattan's position is seen, for it emphasizes an

[2] Even if by some unreasonable stretch it may be assumed *arguendo* that Mr. Simmons "offered" that contract to Appellant Manhattan, the result is the same. By moving to enforce the Arbitration Agreement in the lower Court, Appellant Manhattan clearly manifested its assent to that contract – i.e., its acceptance of Mr. Simmons' offer.

objective test for mutual assent. As indicated in the foregoing cases, a mere signature often introduces an element of *subjectivity* into the question of assent, for it allows the signor to argue that he privately *thought* he or she was assenting to something different from that provided in the contract. On the other hand, the useful *objectivity* of Appellant position is that it precludes the troublesome inquiry into what any one person privately thought and instead turns on the objective legal significance of the person's conduct relating to the contract.

Here, then, Appellant Manhattan asks the Court to determine the legal meaning of its conduct both in offering the Arbitration Agreement and in moving to enforce the same as forms of assent to that contract. And, the legal meaning is clear: Appellant Manhattan was actually *performing* according to the terms of the contract that it offered. That is, in moving to enforce the Arbitration Agreement, rather than litigating this case in the lower court on the merits, Appellant Manhattan was seeking to arbitrate this case as required in that contract. Accordingly, Appellant Manhattan's assent to the Arbitration Agreement is again evident, and Mr. Simmons' argument otherwise is without merit and should be rejected.

2. Authority.

Mr. Simmons next argues that, because the durable power of attorney (DPOA) given to him by his mother did not authorize him to agree specifically to arbitration, the Arbitration Agreement is void for lack of authority. The first flaw in this argument is Mr. Simmons' failure to address the clear language of DPOA. Again, in that instrument Elsie Fidelia Simmons broadly granted Mr. Simmons plenary authority "to conduct *all* of my personal and business affairs..." (T.R., p. 40). Plaintiff tellingly fails to explain to the Court how "*all* personal affairs" somehow does not really mean "all" but rather excludes the power to agree to arbitration.

Second, Mr. Simmons fails to cite any authority for the proposition that Mississippi will

conclude that a person is not authorized to sign an arbitration agreement unless the person had authority to sign an arbitration agreement specifically. Indeed, the landmark case, *Covenant Health Rehab of Picayune, L.P. v. Brown*, 949 So.2d 732 (Miss. 2007) ("*Brown*"), contradicts this point. As explained in Appellants' principal Brief, *Brown* shows that the authority necessary to sign an arbitration agreement for another in the healthcare context may validly be implied in or inferred from another power, such as the power to make healthcare decisions.[3] Thus, Mississippi does not take the myopic view pressed by Mr. Simmons. And again, in any event, courts regard powers of attorney as generally enforceable according to the expressions of the principal's intent therein, so long as the instrument is made a part of the judicial record. *Mississippi Care Center of Greenville, LLC v. Hinyub*, 975 So.2d 211, 216 (¶12) (Miss 2008). Here, that intent was clearly to vest in Mr. Simmons the plenary power over *all* of his mother's personal rights, including her right to agree to arbitrate. Respectfully, Appellants submit that his argument is without merit and should be rejected.

3. Estoppel.

Next, Mr. Simmons argues that he is not estopped from challenging the Arbitration Agreement even though he sues to enforce the greater Admission Agreement containing the former provision. More specifically, he points to the severability clauses allowing a court to enforce the remainder of the Admission Agreement even if it declines to enforce some part thereof, such as the Arbitration Agreement. This argument too is mistaken.

The problem with Mr. Simmons' position is that he failed to satisfy the condition precedent to the severance of the Arbitration Agreement before he sued to enforce the Admission Agreement. In Mississippi, when contractual terms are clear and unambiguous, courts are to

[3] This point also contradicts Mr. Simmons' argument that any authority that he had to make healthcare decisions as his mother's medical surrogate excluded the power to agree to arbitration.

enforce them as written. *HeartSouth, PLLC v. Boyd*, 865 So.2d 1095, 1105 (¶27) (Miss. 2003); *Royer Homes of Mississippi, Inc. v. Chandeleur Homes, Inc.*, 857 So.2d 748, 752 (¶9) (Miss. 2003). Here, on their plain terms, again the severability clauses make the severance of any provision conditional on a final judicial finding that the provision is not enforceable. But, no such finding has been made in this case, and indeed nor will one be made here until this Court has decided this appeal. Thus, on May 18, 2005, when Mr. Simmons sued to enforce the Admission Agreement, which contains the Arbitration Agreement, he could not have availed himself of the severability clauses because he sued without a previous and conclusive judicial finding that the latter contract was not enforceable. Again, therefore, having sued to enforce a contract containing then an enforceable arbitration provision, Mr. Simmons became estopped from challenging the Arbitration Agreement. See *Terminix Intern., Inc. v. Rice*, 904 So.2d 1051, 1058 (¶¶27-29) (Miss. 2004); *Fradella v. Seaberry*, 952 So.2d 165, 175 (¶26) (Miss. 2007) (holding non-signatory realtor was entitled to enforce arbitration clause of land-purchase contract where plaintiff, a party to the contract, sued to enforce realtor's obligations under same).

Taken from any angle, Mr. Simmons is simply estopped in this case from challenging the Arbitration Agreement. In Mississippi, "[i]t is axiomatic that estoppel forbids one from both gaining a benefit under a contract and then avoiding the obligations of that same contract." *Bailey v. Estate of Kemp*, 955 So.2d 777, 782 (¶21) (Miss. 2007). Here, Elsie Fidelia Simmons took the benefit of the healthcare services promised in the Admission Agreement, and now Mr. Simmons takes the benefit of that contract by suing to recover damages for its alleged breach. Yet, he also seeks to repudiate one part of it: the Arbitration Agreement. His position that he is not estopped is contrary to the foregoing case law and is thus without merit.

But, Mr. Simmons further argues that he is not estopped from challenging the Arbitration

Agreement under any third-party beneficiary theory. Mr. Simmons seeks to distinguish the cases cited by Appellants in their principal Brief with the argument that in each such case the Court of Appeals recognized a valid and binding contract whereas here, because of the lack of a signature for Appellant Manhattan, no such contract existed. Again, Mr. Simmons is incorrect. In those cases, the issue was not whether the arbitration agreement was valid and binding but whether the general contracts for healthcare services – i.e., the admission contracts – were so, and the Court of Appeals found them to be so. See *Forest Hill Nursing Center, Inc. v. McFarlan*, 2008 WL 852581, at *5 (¶18) (Miss. Ct. App. Apr. 1, 2008). Here, as shown in Appellants' principal Brief, the Admission Agreement is signed by a representative of Appellant Manhattan. Thus, even to travel upon Mr. Simmons' "no signature, not assent, no valid contract" theory, the Admission Agreement would nevertheless be valid. Again, Mr. Simmons makes an argument without merit.

CONCLUSION

Appellants again respectfully submit for all foregoing reasons that the lower court erred in denying their Motions to Compel Arbitration. Appellants pray that this Court vacate and reverse the circuit court's order denying the Motions and remand this case with instructions to enforce the Arbitration Agreement as to Appellants. Appellants pray for such other and general relief as this Court may deem proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify, as required by M.R.A.P. 25(a), that I served the Appellants' original Brief, as well as 3 copies of the same, upon the following clerk of court via FedEx delivery:

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And, I further certify that I served a true copy of the Brief via U.S. Mail, first class, postage prepaid, upon the following counsel of record and circuit judge:

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