2021 IL App (1st) 201193-U

Nos. 1-20-1193 & 1-20-1215 (cons.)

Order filed September 30, 2021

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

ANTWINE KIZART,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 19 L 5182
	)	
HEATHER HEALTH CARE CENTER, INC., d/b/a HEATHER HEALTH CARE CENTER; ALDEN MANAGEMENT SERVICES, INC.; and CHARLES AKINOLA, LNP,	)	
	)	Honorable
	)	Melissa A. Durkin,
Defendants-Appellees.	)	Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Reyes and Justice Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: Where a nursing home resident sued the nurse, nursing home and management company for injuries sustained from a fall, and defendants moved to dismiss the lawsuit and compel arbitration pursuant to the parties' arbitration agreement, the trial court was required to hold an evidentiary hearing to determine whether the agreement was validly formed based on the resident's allegation that he lacked the capacity to enter into the agreement due to his diagnosed mental and physical illnesses and related medications.

¶ 2 Plaintiff Antwine Kizart, who was a nursing home resident, sustained injuries from a fall and sued defendants, Heather Health Care Center, Inc., d/b/a Heather Health Care Center (Heather), Alden Management Services, Inc. (Alden), and licensed nurse practitioner Charles Akinola. Defendants moved the court to dismiss the complaint with prejudice and compel mediation and arbitration pursuant to the terms of the parties' arbitration agreement. The trial court granted defendants' motion.

¶ 3 On appeal, plaintiff argues that the trial court erred when it ruled that (1) he was competent to enter into the arbitration agreement, (2) the agreement was not procedurally and substantively unconscionable, (3) Alden and Akinola were third-party beneficiaries of the agreement, and (4) the complaint was dismissed with prejudice.

¶ 4 For the reasons that follow, we reverse the judgment of the trial court and remand for further proceedings.[1]

¶ 5 I. BACKGROUND

¶ 6 In 2019, plaintiff sued Heather, Alden and Akinola, alleging that he had been a resident of Heather, a long-term care facility, since May 2016, with the exception of intermittent hospitalizations. Plaintiff alleged that defendants knew or should have known that he was at a high risk for falls; Heather had a below-average staffing level; defendants failed to provide him supervision and assistance with the activities of daily living to ensure that he received proper care and treatment to prevent falls; and he fell on September 9, 2018, and suffered a right intertrochanteric hip fracture that required surgery. Plaintiff alleged that (count I) Heather violated

[1] In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order.

plaintiff's rights under the provisions of the Illinois Nursing Home Care Act (Care Act) (210 ILCS 45/1-101 *et seq*. (West 2018)), and was negligent in the care and treatment of plaintiff; (count II) Alden, which owned, operated, managed and exercised significant control over the necessary components of the day-to-day operations of Heather, and was a "related party" to Heather as defined by the Centers for Medicare Services and the Illinois Department of Healthcare and Family Services, had a duty through its agents and employees to use the skill and care ordinarily used by a reasonably careful management company and was negligent in the management and operation of Heather; and (count III) Akinola, who was on duty at the relevant time, breached his duty to exercise reasonable care by negligent acts and omissions.

¶ 7 Defendants moved to dismiss the complaint with prejudice under section 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2018)), and compel mediation and arbitration. Defendants argued that plaintiff voluntarily signed an arbitration agreement in May 2016 upon his admission to Heather, that agreement was valid, and the Federal Arbitration Act (FAA) (9 U.S.C. § 1 *et seq*.), required the court to direct the parties to mediate the claims alleged in the complaint and, if resolution could not be reached through mediation, then undergo binding arbitration.

¶ 8 In response, plaintiff argued that (1) the arbitration agreement was voidable because he lacked the mental capacity to enter into a contract due to his diagnosed mental and physical illnesses and related medications, (2) the arbitration agreement was unenforceable because it was procedurally unconscionable since, *inter alia*, the Heather employee who presented the agreement to plaintiff did not understand the terms of the agreement, and was substantively unconscionable since it was one-sided where plaintiff gave up the possibility of recovering attorney fees and costs

but Heather excluded from arbitration any fee claims it might have against plaintiff, (3) the arbitration agreement terminated when plaintiff left Heather for a period of hospitalization, and (4) Alden and Akinola had no standing to enforce the arbitration agreement because they were not parties to it.

¶ 9 Plaintiff attached to his response the 24-page admissions packet he received and signed on May 16, 2016, when he was admitted to Heather; the October 30, 2019 deposition of Elaine Walker, Heather's business office manager; and the January 21, 2020 affidavit of plaintiff's expert witness, Daniel Swagerty, MD.

¶ 10 The Heather admissions packet was a folder that contained a 10-page resident agreement, various authorizations, acknowledgements, disclosures, insurance forms and consent forms, and a 3-page arbitration agreement. The arbitration agreement was a pre-printed form placed at the end of the packet. In addition to signing the arbitration agreement, plaintiff also signed authorizations that allowed Heather to open his business mail but not his personal mail, and to photograph him for identification purposes but not to document his medical condition. Plaintiff also signed a document indicating that he received Medicare benefits even though that was not accurate.

¶ 11 In her deposition, Elaine Walker stated that she was Heather's business office manager and had presented the admissions packet to plaintiff when he was admitted to Heather in May 2016. Walker did not remember plaintiff or recall her interaction or conversation with him but thought his name sounded familiar. Usually, Heather's administrator presented the admissions packet to new residents, but Walker would undertake this task in the administrator's absence. Walker explained that she learned how to conduct the admissions packet presentation by attending a few meetings the administrator had conducted with residents and listening to the administrator's

presentation. Walker testified that her normal practice was to review various sections of the packet with the residents, explain certain provisions or disclosures, give the residents some time to review the documents, answer any questions if she knew the answer, and ask the residents to initial each page and show them where to sign the documents. She estimated that she usually spent an hour and a half explaining the admissions packet to the residents.

¶ 12 Walker was not familiar with mental health conditions or behavior disorders. Regarding the arbitration agreement, she told residents that they did not have to sign it, it was strictly voluntary, and it would benefit them because arbitration would be less expensive and quicker than court litigation. She did not know what the Federal Arbitration Act and ADR Systems of America were, how an arbitrator was selected, what the binding arbitration and confidentiality provisions meant, or what rights a resident would be giving up by signing the agreement. She did not know if plaintiff was capable of understanding or comprehending what he was signing.

¶ 13 In his affidavit, Daniel Swagerty, MD, stated that he was a physician licensed to practice medicine in all of its branches; was board certified in family medicine, geriatric medicine, and hospice and palliative medicine; and was a certified medical director for long-term care. He reviewed plaintiff's medical records at Heather, which covered dates of treatment from May 16, 2016, through December 8, 2018, including intermittent hospitalizations. Dr. Swagerty also reviewed Walker's deposition and its exhibits. Dr. Swagerty stated that, at the time of plaintiff's admission to Heather in May 2016, his medical records listed his active diagnoses for three mental illnesses and a seizure disorder and indicated that he was placed at Heather for a "debilitating psychiatric illness/condition." The records indicated that plaintiff received one medication that had side effects of dizziness, tiredness, drowsiness, fatigue, anxiety, and nausea and another

medication that had side effects of headache, nausea, dizziness, drowsiness, and insomnia. Dr. Swagerty opined to a reasonable degree of medical certainty that, given plaintiff's underlying medical and psychiatric conditions, he "could not understand the terms and or content of the arbitration agreement" and "did not have the ability to understand the terms and conditions of the arbitration agreement."

¶ 14 After defendants conducted the discovery deposition of Dr. Swagerty, they filed their reply, arguing that plaintiff, as the party seeking to set aside the arbitration agreement, failed to meet his burden to prove that he was mentally incompetent to sign the agreement due to his psychiatric and medical conditions and the side effects of his medications. Defendants stated that Dr. Swagerty never treated, met, spoke with, or diagnosed plaintiff, and contended that plaintiff's arguments relied on speculation and conjecture. Defendants added that plaintiff's medical records showed that an assessment of plaintiff's functioning level, which was performed three days after his admission to Heather, indicated that he was self-sufficient. Also, notes in plaintiff's chart made at the time of his admission to Heather indicated that he was alert and oriented.

¶ 15 Defendants attached to their reply the deposition of Dr. Swagerty. Dr. Swagerty did not diagnose plaintiff face to face but was aware of plaintiff's clinical conditions as reflected in his medical records and concurred with the diagnoses presented in the records as correct. Dr. Swagerty stated that plaintiff's active mental health disorders were chronic conditions that usually would not become inactive. Plaintiff had several significant comorbidities, all of which impaired his ability to understand the terms and conditions of the arbitration agreement. Although in a general sense some people with one of plaintiff's diagnoses that was well controlled could understand certain contracts, plaintiff's multiple diagnoses, comorbidities, and treatments, which caused side effects,

"contributed to his incapacity for decision-making to understand and execute" the high health literacy level of the arbitration agreement in this case. Plaintiff had the four active diagnoses plus low vision and very low social and occupational function in addition to evolving cerebrovascular disease. He could not live alone, and a person so functionally impaired that he had to be in an institution or live with someone else could not understand the arbitration agreement given its high health literacy level of at least the college level or above. Dr. Swagerty stated, "I don't think he could even understand the concept of giving up his rights to a jury or to file a lawsuit. That concept would have been beyond him." Although plaintiff could follow simple instructions and participate in most of his daily functions, he could not function outside of a custodial environment. Plus, the amount of time Walker spent presenting the admissions packet to plaintiff gave him only minutes to review the complex arbitration agreement.

¶ 16 Although a nurse's May 16, 2016 admission note in plaintiff's records stated that he was "alert and oriented times 3" with no complaints of pain or distress, Dr. Swagerty stated that it would have been beyond the nurse's scope of practice to assess the degree of plaintiff's medication side effects. Furthermore, a social services designee who met with plaintiff upon his admission to Heather documented that plaintiff was age 59, "alert, stable, oriented times 3, and could communicate his thoughts," and "was polite and cooperative." However, Dr. Swagerty stated that the social services designee's background was not known and thus he could not discern whether she was operating within her scope of practice to assess plaintiff and make that determination. That designee also filled out a form by checking boxes or highlighting criteria to list plaintiff's physical functioning, personal care skills, interpersonal relationships, social acceptability, activity abilities and work skills. Dr. Swagerty maintained that the records indicated that Heather did not assess

plaintiff and noted that the social services designee incorrectly indicated that plaintiff had no visual impairment even though his medical records established that he had blurred vision in both eyes due to a cataract and cataract surgery. Dr. Swagerty also stated that there was no evidence or basis to support the social services designee's observations that plaintiff was capable of handling his personal finances.

¶ 17 A document filled out three days after plaintiff was admitted to Heather listed a series of findings about his ability to function. Dr. Swagerty took this document into account but stated that it was not relevant to his opinion that plaintiff was not able to understand the arbitration agreement. Dr. Swagerty summarized that his opinion was based on the evidence of the inadequate time given to plaintiff to review the arbitration agreement, his four diagnoses, his treatment side effects, his low vision, his developing cerebrovascular disease, his documented low functional social and occupational levels, his inability to care for himself in the community, and his tendency to have rude and alienating emotional outbursts and to make homicidal threats. Dr. Swagerty explained that plaintiff lacked the executive function, which requires insight, judgment, and language skills, to understand the arbitration agreement. Dr. Swagerty opined that it was medically improbable to a degree of medical certainty that plaintiff would have been able to understand the arbitration agreement at that highly complex level. Rather, plaintiff merely did what he was asked to do and signed off on a series of documents without considering or understanding what the documents actually said.

¶ 18 The trial court reviewed the parties' written submissions and attached exhibits but did not hold an evidentiary hearing or hear argument on the motion to dismiss the complaint and compel arbitration.

¶ 19 On October 7, 2020, the trial court granted defendants' motion to compel mediation and arbitration and dismissed plaintiff's case in its entirety with prejudice pursuant to section 2-619(a)(9) of the Code. The court ordered the parties to submit this case to nonbinding mediation pursuant to their arbitration agreement. If nonbinding mediation did not resolve this dispute, then the parties must submit plaintiff's claims for binding arbitration to ADR Systems of America, as provided for in the arbitration agreement.

¶ 20 Specifically, the court first found that, regarding plaintiff's claim of legal incompetence, he was competent to sign the arbitration agreement because, notwithstanding his mental health diagnoses, he was found to be alert, oriented and self-sufficient at the time of his admission in 2016, and he filed the instant case in 2019 on his own behalf and not through a guardian or attorney-in-fact. The court did not discuss the credibility of Dr. Swagerty's affidavit or discovery deposition. Second, the court found that the agreement was not unconscionable because (1) plaintiff was not required to sign it to be admitted to and receive treatment from Heather, and (2) both parties agreed to arbitrate their claims and, whereas plaintiff waived the possibility of recovering statutory attorney fees under the Care Act, Heather agreed to pay the first $2,000 of the mediation and arbitration fees. Third, the court found that plaintiff's temporary hospitalization at another facility from September 3 through 8, 2018, did not terminate the resident or arbitration agreement because he returned to Heather after his hospital discharge and sustained his fall injury the following day, on September 9, 2018. Fourth, the court found that Alden and Akinola were covered by the arbitration agreement based on their status as third-party beneficiaries because the agreement referred to them, not by their names, but rather by the categories of Heather's employees and parents, subsidiaries, or affiliates.

¶ 21 Plaintiff appealed the trial court's decision compelling arbitration and dismissing the case with prejudice under Illinois Supreme Court Rule 307(a)(1) (eff. November 1, 2017), which provides that an appeal may be taken from an interlocutory order of the trial court granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction. See *Salsitz v. Kreiss*, 198 Ill. 2d 1, 11 (2001) (an order granting or denying a motion to compel arbitration is injunctive in nature and an appealable interlocutory order under Rule 307(a)(1)).

¶ 22 II. ANALYSIS

¶ 23 On appeal, plaintiff argues that the circuit court erred by granting the motion to dismiss and compel arbitration because (1) he was not competent to sign the arbitration agreement in 2016, (2) the agreement was unconscionable because it removed plaintiff's statutory right to attorney fees, (3) Alden and Akinola were not third-party beneficiaries of the agreement, and (4) the complaint should not have been dismissed with prejudice.

¶ 24 The purpose of a section 2-619 motion to dismiss is to obtain a summary disposition to dispose of issues of law and easily proved issues of fact at the outset of litigation. *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367 (2003); *Sturgill v. Santander Consumer USA, Inc.*, 2016 IL App (5th) 140380, ¶ 21. The moving party admits the legal sufficiency of the complaint, all well-pleaded facts and all reasonable inferences therefrom, but asserts an affirmative defense or other matter, like the exclusive remedy of arbitration, to defeat the plaintiff's claim. *Id.* The court views the pleadings and any supporting documentary evidence in the light most favorable to the nonmoving party. *Van Meter*, 207 Ill. 2d at 367-68. "In addition, the court must draw all reasonable inferences from the record in favor of the nonmoving party. [Citation.]" (Internal quotation marks omitted.) *Garlick v. Naperville Township*, 2017 IL App (2d) 170025,

¶ 44. This court reviews *de novo* a dismissal under section 2-619 of the Code. *Van Meter*, 207 Ill. 2d at 368; see also *Thomas v. Weatherguard Construction Company, Inc.*, 2015 IL App (1st) 123470, ¶ 63 (under *de novo* review, the reviewing court performs the same analysis the trial court would perform). Dismissal of a complaint under section 2-619 is appropriate only if the plaintiff can prove no set of facts that would support a cause of action. *In re Estate of Boyar*, 2013 IL 113655, ¶ 27.

¶ 25 Here, the motion to dismiss was brought under subsection (a)(9) of section 2-619. Section 2-619(a)(9) provides for dismissal on the ground that a claim asserted is "barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9) (West 2018); *Holubek v. City of Chicago*, 146 Ill. App. 3d 815, 817 (1986). An affirmative matter is "something in the nature of a defense that negates the alleged cause of action completely or refutes a crucial conclusion of material fact unsupported by allegations of specific fact contained in or inferred from the complaint." *Id.* The affirmative matter must be either apparent on the face of the complaint or supported by affidavits or certain other evidentiary materials. *Epstein v. Chicago Board of Education*, 178 Ill. 2d 370, 383 (1997). If the affirmative matter is merely evidence upon which a defendant expects to contest an ultimate fact stated in the complaint, a section 2-619 motion to dismiss should not be used. *Hayna v. Arby's, Inc.*, 99 Ill. App. 3d 700, 710 (1981). A motion pursuant to section 2-619(a)(9) should only be granted where there are no material facts in dispute. *Gelinas v. Barry Quadrangle Condominium Association*, 2017 IL App (1st) 160826, ¶ 14. The motion is similar to a summary judgment motion because it requires the court to determine whether the existence of a genuine issue of material fact precludes granting the relief sought—an order compelling arbitration—or, absent a question of fact, whether the moving

party is entitled to relief as a matter of law. See *Andrews v. Marriott International, Inc.*, 2016 IL App (1st) 122731, ¶ 17.

¶ 26 "If a defendant satisfies its initial burden of presenting affirmative matter defeating a plaintiff's complaint, the burden then shifts to the plaintiff to show that the asserted defense is unfounded or leaves unresolved issues of material fact as to an essential element." *Badette v. Rodriguez*, 2014 IL App (1st) 133004, ¶ 16. If the plaintiff fails to carry the shifted burden of going forward, the complaint will be dismissed. *Epstein*, 178 Ill. 2d at 383.

¶ 27 Arbitration agreements are contracts (*Carr v. Gateway*, 241 Ill. 2d 15, 20 (2011)), and are interpreted in the same manner and according to the same rules as are all other contracts (*State Farm Fire & Casualty Co. v. Watts Regulator Co.*, 2016 IL App (2d) 160275, ¶ 27. The interpretation of a contract is a question of law that we review *de novo. Carr*, 241 Ill. 2d at 20. Furthermore, as is the case here, where the circuit court does not hold an evidentiary hearing on a motion to compel arbitration, we review the circuit court's judgment *de novo. Falhstrom v. Jones*, 2011 IL App (1st) 103318, ¶ 13.

¶ 28 "The primary objective in construing a contract is to give effect to the intent of the parties." *Gallagher v. Lenart*, 226 Ill. 2d 208, 232 (2007). We do so by looking to the language of the contract, giving each provision its plain and ordinary meaning, and viewing the provisions in the context of the whole agreement. *Id.* at 233. Ordinarily, where the parties' arbitration agreement provides that "gateway" questions of arbitrability, enforceability, or unconscionability will be decided by the arbitrator, a court will enforce the arbitration agreement as a matter of contract. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 69-70 (2010). However, where a party challenges the enforceability or validity of the arbitration provision itself, a court must address the

enforceability of the arbitration provision before enforcing it. *Id.* at 70; see also *Carter v. SSC Odin Operating Co.*, 2012 IL 113204, ¶ 18 ("[A]n arbitration agreement may be invalidated by a state law contract defense of general applicability, such as fraud, duress, or unconscionability, without contravening section 2 [of the FAA.]"). Capacity to contract requires that a party be of sufficient mental ability to appreciate the effect of what he is doing and be able to exercise his will with reference thereto. *Thatcher v. Kramer*, 347 Ill. 601, 609 (1932); *In re Marriage of Davis*, 217 Ill. App. 3d 273, 276 (1991).

¶ 29 The arbitration agreement at issue here contained the following pertinent language:

> "The parties to the Agreement wish to work together to resolve any disputes that may arise in a timely fashion and in a manner that minimizes both of their legal costs. The parties to this agreement further acknowledge that Resident cannot be required to sign this agreement in order to receive treatment. Therefore, in consideration of the mutual promises contained in the Agreement, the parties hereby agree as follows:
>
> I. Disputes to Be Arbitrated
>
> Any legal controversy, dispute, disagreement or claim of any kind now existing or occurring in the future between the parties arising out of or in any way relating to this Agreement or any occurrence related to the Resident Agreement or the Resident's stay at the Facility shall be settled by binding arbitration, including but not limited to, all claims based on breach of contract, negligence, medical malpractice, tort, breach of statutory duty, resident's rights, any departures from accepted standards of care, and all disputes regarding the scope, enforceability and/or interpretation of this

Agreement, allegations of fraud in the inducement or requests for rescission of this Agreement. This includes claims against Facility, its employees, agents, officers, directors, any parent, subsidiary or affiliate of Facility. ***

In the event of any such claim, the parties shall first use their best efforts to resolve the dispute through a mediation process. For the purpose of the Agreement, 'mediation' means a non-binding process during which the parties meet in person to attempt to resolve a dispute with the assistance of a mutually selected, neutral third party. If the parties are unable to resolve the dispute informally, BOTH PARTIES AGREE TO WAIVE THEIR RIGHT TO A JURY TRIAL AND AGREE TO HAVE THE MATTER RESOLVED BY BINDING ARBITRATION BEFORE AN ARIBTRATOR AS DESCRIBED IN THIS AGREEMENT AND SET FORTH HEREIN.

Resident agrees that there shall be no right or authority for any dispute, controversy or claim to be arbitrated on a class action basis or on any basis involving claims brought in a purported representative capacity on behalf of the general public, or other persons or entities similarly situated. Furthermore, claims brought by or against a person or entity may not be joined or consolidated in the arbitration with claims brought by any other person or entity.

Notwithstanding the foregoing, any legal controversy, dispute, disagreement or claim of any kind between Resident and Facility regarding

> nonpayment by Resident for payments due to Facility shall be adjudicated in a court of law, or arbitrated as set forth herein if mutually agreed to by Facility and Resident.
>
> II. Arbitration Process
>
> * * *
>
> **Costs of Arbitration.** Facility agrees to pay the mediator and/or arbitrator's fees and other reasonable costs associated with mediation and arbitration up to a maximum of $2,000. Any additional fees and costs shall be borne equally by the parties of this Agreement.
>
> Each party agrees to be responsible for their own attorney fees and costs incurred in relation to this Agreement. Resident further agrees to waive any and all costs and attorney's fees under the Illinois Nursing Home Care Act.
>
> ***
>
> **Confidentiality.** Each party shall keep all material aspects of the arbitration proceeding confidential." (Emphasis in original.)

¶ 30 Finally, a section entitled "III. Resident's Acknowledgments" provided, *inter alia*, that the resident, by signing this arbitration agreement, acknowledged that he read the agreement, received a copy of it, and signed it without any influence. Further, he signed this agreement not as a condition of admission and acknowledged that care and treatment would be provided whether or not he signed this agreement.

¶ 31 Plaintiff's Legal Competence

¶ 32 Plaintiff argues that the court erred when it ruled that plaintiff was competent to enter into the arbitration agreement in 2016 by reasoning that he filed this lawsuit on his own behalf in 2019 and not through a guardian or attorney-in-fact. Plaintiff also argues that Dr. Swagerty's unrebutted expert testimony in his discovery deposition established that plaintiff did not possess the capacity to understand the terms and conditions of the arbitration agreement when he signed it in 2016.

¶ 33 Specifically, Dr. Swagerty testified that he concurred with the diagnoses of the three mental health disorders and a seizure disorder at the time of plaintiff's 2016 admission to Heather. Plaintiff's medical records also indicated that he was developing cerebrovascular disease and had a significant visual loss due to a cataract and cataract surgery. Furthermore, plaintiff's medications for his conditions and the conditions themselves contributed to his incapacity for decision-making and understanding the agreement. Dr. Swagerty stated that it was unlikely that a person taking plaintiff's dosage of medication would not have side effects of tiredness and fatigue. Although plaintiff's medical records indicated that he was alert and oriented at the time in question, Dr. Swagerty asserted that those functions addressed a different matter than the subject of cognitive capacity, and there was no evidence of either an actual assessment by the facility or a basis for its observations. Dr. Swagerty opined that plaintiff, with his six major conditions, could not have understood the arbitration agreement when he signed it and the concept of giving up his rights to a jury or to file a lawsuit would have been beyond him.

¶ 34 Defendants argue that the trial court properly dismissed the complaint and compelled arbitration because plaintiff failed to meet his burden to prove his own mental incompetence since he did not testify on his own behalf and failed to show that he was incapable of comprehending

the nature of the transaction and protecting his interest in the transaction. Defendants also argue that the deposition of Dr. Swagerty produced evidence that his opinions were not credible because he never treated or met plaintiff, allegedly did not know that plaintiff had attended college and could read, and allegedly ignored notations in plaintiff's 2016 medical records indicating that he was assessed as totally self-sufficient in reading, writing and arithmetic, was "alert, and oriented times three," and was able to communicate with no complaints of pain or duress.[2]

¶ 35 In this appeal, the question before us is whether there was a sufficient showing of evidence to sustain the trial court's order granting defendants' 2-619 motion to dismiss and compelling arbitration. See *Bass v. SMG, Inc.*, 328 Ill. App. 3d 492, 496 (2002). "Generally, the standard of review of an order granting or denying a motion to compel arbitration is whether the trial court abused its discretion." *Federal Signal Corp. v. SLC Technologies, Inc.*, 318 Ill. App. 3d 1101, 1105 (2001). Defendants' motion to dismiss the complaint and compel arbitration argued that plaintiff voluntarily signed the arbitration agreement in 2016, that agreement was valid, and plaintiff's claims fell within the scope of that agreement. Plaintiff responded that he did not have the mental capacity to enter the agreement, the agreement was unconscionable, the agreement terminated when he left Heather for a period of hospitalization, and Alden and Akinola had no standing to enforce the agreement because they were not parties to it.

¶ 36 The court must decide as an initial matter whether a contract exists before it decides whether to stay or dismiss an action and order arbitration. *Mohammed v. Uber Technologies, Inc.*, 237 F. Supp. 3d 719, 728 (N.D. Ill. 2017).

[2] Our review of Dr. Swagerty's deposition establishes that he knew both that plaintiff attended some college and could read, and that he considered the aforementioned notations in plaintiff's medical records in forming his expert opinion on plaintiff's capacity.

> "[O]ur precedents hold that courts should order arbitration of a dispute only where the court is satisfied that neither the formation of the parties' arbitration agreement *nor* (absent a valid provision specifically committing such disputes to an arbitrator) its enforceability or applicability to the dispute is in issue. Where a party contests either or both matters, the court must resolve the disagreement." (Emphasis in original and internal quotation marks and citations omitted.)" *Id.* at 727-28 (quoting *Granite Rock Co. v. International Brotherhood of Teamsters*, 561 U.S. 287, 299-300 (2010)).

Thus, before the trial court could reach the question of whether the arbitration agreement was unconscionable or whether Alden and Akinola were third-party beneficiaries to the agreement, the court first had to find there was a valid agreement between the parties. "[T]here is no arbitration without a valid contract to arbitrate." *Tortoriello v. Gerald Nissan of North Aurora, Inc.*, 379 Ill. App. 3d 214, 226 (2008).

¶ 37 Defendant's section 2-619 motion raised the affirmative matter of the arbitration agreement and asserted that plaintiff signed it and it was valid. Defendants had the burden to establish their affirmative matter—in this case the existence of a valid arbitration agreement—with evidence. *Andrews*, 2016 IL App (1st) 122731, ¶ 19 (" 'Unless the affirmative matter is already apparent on the face of the complaint, the defendant must support the affirmative matter with an affidavit or some other material that could be used to support a motion for summary judgment.' [Citation.]"). "Where the facts are *not* in dispute, *** the existence of a contract is a question of law, which the trial court may decide on a motion for summary judgment." (Emphasis added.) *Mid-Century Insurance Co. v. Founders Insurance Co.*, 404 Ill. App. 3d 961, 967 (2010). Where the pleadings on file raise a genuine issue of material fact as to the validity of the contract which forms the basis

of the motion, the moving party is not entitled to relief. See *Amato v. Edmonds*, 87 Ill. App. 3d 68, 72 (1980) ("we believe that the plaintiffs were not entitled to receive summary judgment in their forcible entry and detainer action where the pleadings on file in that action raise a genuine issue of material fact, *i.e.*, the validity of the installment contract itself").

¶ 38 In response to defendant's section 2-619 motion, plaintiff alleged that he lacked the legal capacity to enter into the arbitration agreement and supported that claim with the affidavit of Dr. Swagerty, who opined to a reasonable degree of medical certainty that plaintiff did not have the ability to understand the terms and conditions of the arbitration agreement. Dr. Swagerty based his opinion on his review of the agreement, Walker's deposition and its exhibits, and plaintiff's medical records. Those medical records established plaintiff's underlying medical and psychiatric condition, *i.e.*, his active diagnoses of three mental health disorders and a seizure disorder, his related medications, and the side effects of that medication.

¶ 39 In their reply, defendants argued that plaintiff bore the burden to prove his mental incompetence. They also argued that plaintiff failed to meet that burden because his arguments relied on speculation and conjecture since Dr. Swagerty never met or treated him. Furthermore, Defendants cited notations in plaintiff's medical records that indicated that he was self-sufficient, alert, and oriented at the time he signed the agreement or three days thereafter. Defendants submitted Dr. Swagerty's discovery deposition and plaintiff's medical records, under seal, to support their arguments.

¶ 40 Because defendants presented adequate evidence of the existence of their affirmative defense or other affirmative matter, *i.e.*, the arbitration agreement signed by plaintiff, the burden then shifted to plaintiff, who was required to establish that the affirmative matter was either

unfounded or involved an issue of material fact. See *Malone v. American Cyanamid Co.*, 271 Ill. App. 3d 843, 846 (1995) ("a party opposing a motion for summary judgment may rely solely upon his pleadings to create a material question of fact until the movant supplies facts that would clearly entitle him to judgment as a matter of law"). Plaintiff's response to defendants' motion argued, *inter alia*, that plaintiff did not have the mental capacity to enter the agreement, and plaintiff produced evidence in support of that argument. Defendants' reply attempted to refute plaintiff's claim of mental incapacity with notations in his medical records, which were used by defense counsel to attempt to confront Dr. Swagerty during his discovery deposition.

¶ 41 Based on our review of the record, defendants' evidence in support of plaintiff's capacity does not entitle them to relief on their motion to compel. See *Evergreen Oak Electric Supply & Sales Co. v. First Chicago Bank of Ravenswood*, 276 Ill. App. 3d 317, 319 (1995) ("Affirmative matter within the meaning of 2-619(a)(9) must be something more than evidence offered to refute well-pled facts in the complaint."). Plaintiff raised a question of fact as to the validity of the agreement and whether it was unconscionable in light of plaintiff's alleged incapacity. Defendants did not refute the existence of that question of fact but at best merely presented evidence upon which they expected to contest the ultimate fact of plaintiff's incapacity. The trial court could not resolve this dispute on the parties' pleadings.

¶ 42 The manner in which the trial court proceeded was not sufficient to decide the motion. "In deciding the merits of a section 2-619 motion, a trial court cannot determine disputed factual issues solely upon affidavits and counteraffidavits. If the affidavits present disputed facts, the parties must be afforded the opportunity to have an evidentiary hearing. [Citations.]" (Internal quotation marks omitted.) *Dinerstein v. Evanston Athletic Clubs, Inc.*, 2016 IL App (1st) 153388,

¶ 33. Moreover, "[s]ection 2(a) [of the Illinois Uniform Arbitration Act (710 ILCS 5/2(a) (West 2018)), which governs the court proceedings when the court initially decides the question of arbitrability,] directs the trial court to 'proceed summarily' to a determination of the issues. The directive to 'proceed summarily' has been interpreted as a directive to conduct a summary proceeding. [Citations.]" *Sturgill*, 2016 IL App (5th) 140380, ¶ 25.

¶ 43 The trial court was required to conduct a "summary proceeding" to determine the issues. *Id*. ¶ 25; see also *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 229 (2d Cir. 2016) ("If there is an issue of fact as to the making of the agreement for arbitration, then a trial is necessary.") (Internal quotation marks omitted); accord *Bensadoun v. Jobe-Riat*, 316 F.3d 171, 175 (2003) (citing 9 U.S.C. § 4 of the FAA); accord *Sphere Drake Insurance Ltd. v. Clarendon National Insurance Co.*, 263 F.3d 26, 30 (2d Cir. 2001).

> "A summary proceeding may be defined, generally, as a civil or criminal proceeding in the nature of a trial conducted without the formalities (as indictment, pleadings, and a jury) *** and used for the speedy and peremptory disposition of some minor matter. [Citations.] Thus, when the trial court is faced with a motion to compel arbitration, the court should act expeditiously and without a jury trial to make a substantive determination of whether a valid arbitration agreement exists, and to resolve any other issues raised by the motion to compel arbitration. [Citations.]" *Sturgill*, 2016 IL App (5th) 140380, ¶¶ 24-25.

¶ 44 The trial court found the arbitration clause was not unconscionable and that plaintiff failed to establish his mental incapacity in a way that invalidated the agreement. But the trial court failed to conduct an evidentiary hearing to determine those matters denying the existence of an agreement

to arbitrate. Moreover, the court's factual determination after a hearing on plaintiff's mental capacity may impact its determination of whether the arbitration clause is unconscionable as a matter of law. See generally *Fuqua v. SVOX AG*, 2014 IL App (1st) 131429, ¶ 36 ("In determining whether a term is procedurally unconscionable, the court considers a lack of bargaining power."); *Lannon v. Lamps*, 80 Ill. App. 3d 318, 324 (1980) (considering poor physical shape and questionable mental competence concerning business matters of contracting party to find the trial court could find agreement was not fairly and understandably entered and specific performance would be unconscionable).

¶ 45 Because plaintiff raised a question of fact as to his capacity to enter into the arbitration agreement, and the trial court did not conduct an evidentiary hearing on that issue, we cannot say that there was a sufficient showing to sustain the trial court's order granting the motion to compel arbitration. Accordingly, we reverse the trial court's judgment granting defendants' motion to dismiss and compel arbitration, and we remand for an evidentiary hearing on defendants' motion and plaintiff's response. See *Sturgill*, 2016 IL App (5th) 140380, ¶ 27 ("we must reverse the order and remand the case to the trial court with instructions to proceed summarily, to resolve those issues that can properly be decided by the court"). On remand, the parties should be permitted to introduce evidence. See *Kinney v. Lindgren*, 373 Ill. 415, 420 (1940) ("When a judgment is reversed and the cause remanded with directions to proceed in conformity to the decision then filed, and it appears from the opinion that the grounds of reversal are of a character to be obviated by amendment of the pleadings or by the introduction of additional evidence, the trial court is bound to permit the cause to be redocketed and to permit such amendments and the introduction of further evidence on the new hearing.").

¶ 46 III. CONCLUSION

¶ 47 For the foregoing reasons, the judgment of the circuit court of Cook County is reversed and the cause remanded for further proceedings in conformity with this order.

¶ 48 Reversed and remanded.