

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

GRACE THOMAS, AS EXECUTRIX OF THE  
ESTATE OF JOHN DICKERSON,  
DECEASED

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

v.

EXTENDICARE HEALTH FACILITIES,  
INC., D/B/A HAVENCREST NURSING  
CENTER; EXTENDICARE HEALTH  
FACILITY HOLDINGS, INC.;  
EXTENDICARE HEALTH SERVICES, INC.;  
EXTENDICARE NETWORK, INC.;  
EXTENDICARE HOLDINGS, INC.;  
EXTENDICARE REIT; EXTENDICARE,  
L.P.; EXTENDICARE, INC.

APPEAL OF: EXTENDICARE, INC.,  
EXTENDICARE HEALTH FACILITIES, INC.  
D/B/A HAVENCREST NURSING CENTER,  
EXTENDICARE HEALTH FACILITY  
HOLDINGS, INC., EXTENDICARE HEALTH  
SERVICES, INC., EXTENDICARE HEALTH  
NETWORK, INC., EXTENDICARE  
HOLDINGS, INC.

No. 953 WDA 2014

Appeal from the Order May 13, 2014  
In the Court of Common Pleas of Washington County  
Civil Division at No(s): 2013-911

BEFORE: BENDER, P.J.E., LAZARUS, J., and MUNDY, J.

MEMORANDUM BY LAZARUS, J.:

**FILED JULY 31, 2015**

Extendicare, Inc., Extendicare Health Facilities, Inc. d/b/a Havencrest  
Nursing Center, Extendicare Health Facility Holdings, Inc., Extendicare  
Health Services, Inc., Extendicare Health Network, Inc. and Extendicare

Holdings, Inc. ("Extendicare") appeal from the order entered in the Court of Common Pleas of Washington County denying a motion to amend preliminary objections. Upon careful review, we quash the appeal.

John Dickerson ("Decedent") was a resident at Havencrest Nursing Center. During his time there, Decedent suffered injuries and illness, including an open pressure ulcer to his coccyx, pneumonia, dehydration, malnutrition, poor hygiene, pain and, ultimately, death. On February 19, 2014, Grace Thomas, in her capacity as Executrix of the Decedent's Will ("Executrix"), commenced a civil action against Extendicare, alleging abuse and neglect and setting forth claims for survival, wrongful death and punitive damages.

On March 19, 2014, Extendicare filed preliminary objections to the complaint in the nature of a demurrer and motion to strike. Executrix responded on April 7, 2014. By order dated April 17, 2014, the court scheduled oral argument on Extendicare's preliminary objections for June 6, 2014. Thereafter, on May 13, 2014, Extendicare filed a motion to amend its preliminary objections, in which it sought to assert its right to arbitration pursuant to a "recently discovered" arbitration agreement signed by the Executrix in her capacity as Decedent's agent under a power of attorney. The court held a hearing on the motion to amend on May 13, 2014, and

immediately denied the motion by order dated that same day.<sup>1</sup> On June 12, 2014, Extendicare filed a motion with the trial court, requesting that the court amend its May 13, 2014 order to state: (1) that a substantial issue of venue or jurisdiction is presented, **see** Pa.R.A.P. 311(b)(2); or (2) that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the matter, **see** 42 Pa.C.S.A. § 702(b). Either requested amendment would have allowed Extendicare to seek an immediate appeal. The trial court denied that motion the same day, stating that its dismissal of the motion to amend preliminary objections “was procedural and not on the merits,” citing ***Lyons v. Bechtel Corp.***, 440 A.2d 625 (Pa. Super. 1982) (where court denies preliminary objections on procedural grounds, rather than on merits, such order is interlocutory and unappealable).

Also on June 12, 2014, Extendicare filed a notice of appeal to this Court. Thereafter, on July 10, 2014, Extendicare filed a petition for review, invoking this Court’s jurisdiction pursuant to Pa.R.A.P. 1501(a)(4), which authorizes a party to seek appellate review of a trial court order refusing to

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<sup>1</sup> The trial court subsequently entered an order on June 6, 2014, granting the parties’ stipulation as to certain of Extendicare’s preliminary objections, overruling other preliminary objections, and granting the preliminary objection regarding the inclusion in Executrix’ complaint of impertinent and scandalous material. This order is not at issue in this appeal.

certify an interlocutory order for immediate appeal. Although Extendicare believed that the trial court's May 13, 2014 order was appealable as of right pursuant to 42 Pa.C.S.A. § 742 (granting exclusive appellate jurisdiction of appeals from final orders of courts of common pleas to Superior Court), 42 Pa.C.S.A. § 7320(a)(1) (authorizing appeal from order denying application to compel arbitration), Pa.R.A.P. 311(a)(8) (granting interlocutory appeal as of right from order made appealable by statute or general rule), and Pa.R.A.P. 313 (defining and granting appeal as of right from collateral order), **see** Brief of Appellant, at 1 (Statement of Jurisdiction), it also sought, apparently in an abundance of caution, review of the trial court's June 12, 2014 order denying Extendicare's motion to amend the court's order of May 13, 2014.

Extendicare filed its court-ordered statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b) on June 25, 2014. The trial court issued its Rule 1925(a) opinion on August 14, 2014.

On appeal, Extendicare raises the following questions for our review:

- I. Is the trial court's [o]rder denying [Extendicare's] [m]otion to [a]mend [p]reliminary [o]bjections to include a motion to compel arbitration an "order denying an application to compel arbitration"?
- II. Is the trial court's [o]rder denying [Extendicare's] [m]otion to [a]mend [p]reliminary [o]bjections in order to compel arbitration immediately appealable as a collateral order pursuant to Pa.R.A.P. 313?
- III. Did the trial court commit an error of law, including a violation of the Federal Arbitration Act, or abuse its discretion in denying [Extendicare's] [m]otion to [a]mend [p]reliminary [o]bjections?

Brief of Appellants, at 4.

Prior to addressing the merits of Extendicare's claims, we must determine whether we possess jurisdiction over this appeal. In her brief, Executrix argues that the appeal must be quashed. In support of this position, Executrix cites, *inter alia*, to this Court's decisions in **Grier v. Scientific Living, Inc.**, 384 A.2d 1254 (Pa. Super. 1978) and **Lyons, supra**, both of which stand for the proposition that where preliminary objections are dismissed on procedural, rather than substantive, grounds, the order is a non-appealable interlocutory order. We agree.

Here, the trial court held a hearing on the motion to amend preliminary objections, in which it stated the following:

THE COURT: Denied. First of all, all the Preliminary Objections have to be filed together. And second of all, we already know what the law is in this matter [**Pisano v. Extendicare**, 77 A.3d 651 (Pa. Super. 2013)].

So you preserve it, Mr. Schulberg, but I don't need to hear it again. Thank you all.

N.T. Motion Argument, 5/13/14, at 2-3. Subsequently, in its Rule 1925(a) opinion, the court stated that it denied Extendicare's motion to amend preliminary objections because: (1) all preliminary objections must be presented at one time pursuant to Pa.R.C.P. 1028(b); and (2) the court did not find credible Extendicare's claim that it had only recently discovered the arbitration agreement, which had been in Extendicare's possession since March 9, 2011, the date of the document's execution. Accordingly, despite its passing reference to **Pisano**, the trial court clearly denied the motion on

procedural grounds pursuant to Rule 1028(b). Therefore, its order is interlocutory and we lack jurisdiction to consider the appeal.<sup>2</sup>

Appeal quashed; petition for review denied.<sup>3</sup>

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<sup>2</sup> Even if we were to consider the merits of Extendicare's appellate issues, it would be entitled to no relief on its ultimate underlying claim, i.e., that the Appellee's survival claim should be subject to arbitration even though **Pisano** requires that the wrongful death claim be tried in court. Recently, in **Taylor v. Extendicare Health Facilities, Inc.**, 113 A.3d 317 (Pa. Super. 2015), we held that Pa.R.C.P. 213(e) and the wrongful death statute, 42 Pa.C.S.A. § 8301(a), require that a survival act claim otherwise subject to the terms of an arbitration agreement be consolidated for trial with a wrongful death claim where the wrongful death beneficiaries are not bound by the arbitration agreement and do not consent to arbitration. In doing so, we concluded that the consolidation of wrongful death and survival claims under such circumstances does not offend the stated goals of the Federal Arbitration Act and promotes judicial economy and public policy interests, which are best served by allowing for the resolution of all claims with all parties present and avoiding inconsistent verdicts and duplicative damages.

<sup>3</sup> In its petition for review, Extendicare asserts that the trial court's order declining to allow amendment of its preliminary objections to include a motion to compel arbitration "involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal will materially advance the ultimate termination of the matter." Petition for Review, at ¶ 15. However, as noted *supra* in footnote 2, this Court's decision in **Taylor** controls the underlying arbitration issue in this matter. Accordingly, there is no "substantial ground for difference of opinion" of which an immediate appeal would facilitate resolution. The issue has, in fact, been resolved. Accordingly, we deny the petition for review.

J-A07010-15

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 7/31/2015