FIRST DIVISION
February 22, 2011

No. 1-09-3045

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

KAREN WALKER,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	
	)	No. 09 L 003285
ROBERT WATSON, III, and	)	
KELVIN OLADIJI,	)	
	)	
Defendants	)	
	)	
(Bob Watson Chevrolet, Inc.,	)	Honorable
	)	Lee Preston,
Defendant-Appellee).	)	Judge Presiding.

PRESIDING JUSTICE HALL delivered the judgment of the court. Justices Lampkin and Rochford concurred in the judgment.

ORDER

HELD: Circuit court did not err in granting the defendant's motion to compel arbitration where (1) the plaintiff's allegations were insufficient to establish procedural unconscionability or to warrant an evidentiary hearing, and (2) the evidence established that the arbitration agreement was part of the purchase order.

Pursuant to Supreme Court Rule 307(a)(1) (Official Reports Advance Sheet No. 7 (April 8, 2009), R. 307(a)(1), eff. March 20, 2009), the plaintiff, Karen Walker, brings this interlocutory

appeal from an order of the circuit court of Cook County granting the motion of the defendant, Bob Watson Chevrolet, Inc., to compel arbitration. On appeal, the plaintiff contends that the circuit court employed the wrong legal standard when it ruled on the unconscionability of the arbitration agreement, and that the court erred in construing the contract against the plaintiff because the integration clause contained in the sale contract was ambiguous. We affirm the order of the circuit court.

The plaintiff filed a multi-count complaint against Robert Watson, III, Kelvin Oladiji and the defendant, seeking damages and other relief in connection with her purchase of a 2008 Dodge Durango.[1] The plaintiff alleged that the defendant represented to her that the vehicle was in good condition and that it came with a manufacturer's warranty. Subsequent to her purchase, the plaintiff discovered that the vehicle was a "rebuilt wreck" and that the warranty had been voided by that prior accident.

The defendant filed a motion to compel arbitration. The defendant alleged that at the time of purchase, the plaintiff executed an arbitration agreement the terms of which compelled the parties to submit the claims alleged in the plaintiff's complaint to arbitration. In response, the plaintiff questioned

[1]Defendants Robert Watson, III, and Kelvin Oladiji are not parties to this appeal.

whether the signature on the arbitration agreement was in fact hers. In addition, she asserted that the arbitration agreement was unconscionable because she did not receive a copy of the agreement. In her supporting affidavit, she averred that the signature on the agreement "may not be mine," and that she was "absolutely positive that I never saw [the arbitration agreement] when I was signing the purchase documents and never received it from the [defendant] among the documents I signed." Finally, she maintained the arbitration agreement was not part of the purchase order containing the terms of the contract between the parties.

In granting the motion to compel arbitration, the circuit court rejected the plaintiff's allegation of forgery because the plaintiff did not definitively assert that the signature on the arbitration agreement was not hers. The court determined that the plaintiff had failed to establish that the arbitration agreement was both procedurally and substantively unconscionable. She had not provided any evidence of unconscionability other then her averments in her affidavit, which were insufficient to warrant a hearing. The court further determined that the term "agreements" in the purchase order included the arbitration agreement. Therefore, the arbitration agreement was part of the purchase order for the sale of the vehicle to the plaintiff.

The circuit court granted the motion to compel arbitration. From that order, the plaintiff brings this interlocutory appeal.

ANALYSIS

I. Standard of Review

In general, the standard of review for interlocutory appeals is whether the circuit court abused its discretion in granting the relief requested. *Czarnik v. Wendover Financial Services*, 374 Ill. App. 3d 113, 116, 870 N.E.2d 875 (2007). Where, as here, the court made no findings of fact, we review the decision to grant the motion to compel *de novo*. *Czarnik*, 374 Ill. App. 3d at 116.

II. Discussion

The plaintiff contends, first, that the circuit court erred when it required her to establish that the arbitration agreement was both procedurally and substantively unconscionable. Our supreme court has rejected the requirement that both procedural and substantive unconscionability be found before a contract or contract provision will be found to be unenforceable. *Kinkel v. Cingular Wireless, LLC*, 223 Ill. 2d 1, 21, 857 N.E.2d 250 (2006) (citing *Razor v. Hyundai Motor America*, 222 Ill. 2d 75, 854 N.E.2d 607 (2006)). However, the circuit court's error does not require reversal, as our review of the court's determination as to unconscionability of a contract or a portion

thereof is *de novo*. *Kinkel*, 223 Ill. 2d at 22.

" 'Procedural unconscionability refers to a situation where a term is so difficult to find, read, or understand that the plaintiff cannot fairly be said to have been aware he was agreeing to it ***.' " *Kinkel*, 223 Ill. 2d at 22 (quoting *Razor*, 222 Ill. 2d at 100). " 'Substantive unconscionability concerns the actual terms of the contract and examines the relative fairness of the obligations assumed. [Citation.] Indicative of substantive unconscionability are contract terms so one-sided as to oppress or unfairly surprise an innocent party, an overall imbalance in the obligations and rights imposed by the bargain, and significant cost-price imbalance.' " *Kinkel*, 223 Ill. 2d at 28 (quoting *Maxwell v. Fidelity Services, Inc.*, 907 P.2d 51, 58 (Ariz. 1995)).

The plaintiff does not contend that the arbitration agreement was substantively unconscionable, but contends that she established procedural unconscionability. She maintains that her allegations and averments in her affidavit establish that the defendant deliberately concealed the existence of the arbitration agreement from her. As a result, the defendant could use the agreement to its advantage: if the defendant wished to sue the plaintiff, the document would remain concealed; if the plaintiff wished to sue the defendant, the defendant would produce the

agreement to compel arbitration.

The plaintiff's averment in her affidavit that she never saw the arbitration agreement is belied by the fact that her signature appears on the agreement. While she attempted to cast doubt on the validity of her signature, her averment conceded that the signature could be hers. Even if the plaintiff did not receive a copy of the arbitration agreement, her signature on the agreement indicated that she was aware of the existence of the agreement. See *Keefe v. Allied Home Mortgage Corp.*, 393 Ill. App. 3d 226, 232-32, 912 N.E.2d 310 (2009) (the plaintiff could not be unaware he was agreeing to arbitration where the arbitration rider was not hidden in the fine print but was a separate document, which the plaintiff had signed).

We agree with the circuit court that the plaintiff failed to establish that the arbitration agreement was procedurally unconscionable, or that her allegations warranted an evidentiary hearing.

The plaintiff then contends that the circuit court erred when it construed the integration clause in the purchase order in favor of the defendant. The plaintiff argues that the integration clause was ambiguous and should have been construed against the drafter, in this case, the defendant. The defendant responds that the plaintiff forfeited her ambiguity argument on

appeal by failing to raise it in the circuit court. In her reply brief, the plaintiff concedes that it was only after the court granted the motion to compel arbitration that she reconsidered her position that the sales contract was unambiguous. We decline to find forfeiture in this case as explained below.

Where a dispute exists between the parties as to the meaning of a contract provision, the threshold question is whether the contract is ambiguous. *Hillenbrand v. Meyer Medical Group, S.C.*, 288 Ill. App. 3d 871, 875-76, 682 N.E.2d 101 (1997). Whether a contract is ambiguous is a question of law and is to be decided initially by the circuit court from an examination of the instrument as a whole before any extrinsic evidence is considered. *Hillenbrand*, 288 Ill. App. 3d at 876. However, as a question of law, this court will independently determine the issue without deference to the circuit court's judgment. *Hillenbrand*, 288 Ill. App. 3d at 876.

The purchase order provided in pertinent part as follows:

> " 'Purchaser agrees that this Order (on the face and the reverse side hereof) of even date include all terms and conditions of the contract between parties, that this Order cancels and supercedes any prior agreement, that, as of the date hereof, such agreements comprise the complete and exclusive statement of the terms of the contract between the

parties ***.' "

A contract is not ambiguous simply because the parties disagree as to its meaning. *Hillenbrand*, 288 Ill. App. 3d at 876. A contract is deemed to be ambiguous if it is susceptible to more than one reasonable construction. *Owens v. McDermott, Will & Emery*, 316 Ill. App. 3d 340, 348, 736 N.E.2d 145 (2000). Where, after considering the language of the agreement, the court determines that the document is ambiguous, the court may look beyond the agreement to ascertain the intent of the parties. *Hillenbrand*, 288 Ill. App. 3d at 876.

We agree with the plaintiff that the integration clause is ambiguous. While it states that the face and reverse side of the purchase order constitutes all the terms and conditions of the contract between the parties, it then refers to "agreements." It is unclear whether the term "agreements" refers to the terms of the purchase order or the various other agreements signed by the plaintiff as part of the transaction. In light of the ambiguity, we may consider extrinsic evidence to ascertain the parties' intent. *Gallagher v. Lenart*, 226 Ill. 2d 208, 233, 874 N.E.2d 43 (2007).

Turning to the extrinsic evidence, the plaintiff points out that the defendant specifically referenced the information contained in the vehicle's window sticker, but not the

arbitration agreement, as part of the purchase order. However, according to the affidavit of Jim Bricker, the defendant's director of operations, the arbitration agreement was completed as part of the sale and was a part of the contract for the sale of the vehicle. The plaintiff stated in her affidavit that she did not see the arbitration agreement among the purchase documents. Still, she stopped short of denying that the signature on the agreement was hers.

The plaintiff argues that the ambiguity requires that the integration clause be construed in her favor. That doctrine, known as *contra proferentem,* will be resorted to only if the court fails to ascertain the intent of the parties using ordinary principles of contractual interpretation. *Premier Title Co. v. Donahue* 328 Ill. App. 3d 161, 166, 765 N.E.2d 513 (2002) (recognizing that, at best, the rule was a secondary rule of construction). There is a long-standing principle that instruments, executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, are regarded as one contract and will be construed together. *Gallagher*, 226 Ill. 2d at 233. Here, the uncontradicted evidence established that the arbitration agreement was executed at the same time as the purchase order and the other documents comprising the sale of the vehicle to the plaintiff. The

arbitration agreement specifically provided that it was part of the purchase order. Even more significant in light of the plaintiff's allegations is the last paragraph of the arbitration agreement, which appears below the plaintiff's signature and provides as follows:

> "BY SIGNING BELOW YOU ACKNOWLEDGE THAT YOU HAVE READ THIS ARBITRATION AGREEMENT AND THAT YOU AGREE TO ITS TERMS AND CONDITIONS."

We conclude from an examination of the extrinsic evidence that the parties intended the reference to "agreements" in the purchase order to include other agreements, such as the arbitration agreement, which were executed as part of the sale and purchase of the vehicle.

CONCLUSION

The order of the circuit court granting the defendant's motion to compel arbitration is affirmed.

Affirmed.