2013 IL App (1st) 121140-U

FOURTH DIVISION
March 28, 2013

No. 1-12-1140

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DONNA J. BROWN,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	11 L 9126
	)	
AIMCO CENTRAL PARK TOWNHOMES, LLC,	)	The Honorable
	)	Eileen Mary Brewer,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Lavin and Justice Fitzgerald Smith concurred in the judgment.

ORDER

HELD: The circuit court did not err in entering an order to compel arbitration in an action by a tenant against a landlord pursuant to an arbitration provision in a lease agreement. The arbitration was not procedurally unconscionable, despite plaintiff's objection that it was "hidden" in a 24-page pre-printed form lease with small font where plaintiff was not prevented from reading the lease and its terms, including the arbitration

provision, the arbitration provision was referenced in other sections of the lease, and plaintiff had an additional two years to read the terms of the lease before renewing it. The arbitration provision also was not so one-sided as to be substantively unconscionable where the landlord and tenant were both bound to arbitrate, except for actions by the landlord to evict or for possession or past due rent, and it provided that the substantially prevailing party would be awarded costs.

¶ 1 BACKGROUND

¶ 2 Plaintiff, Donna Brown, leased a townhome from defendant, Aimco Central Park Townhomes, LLC (Aimco) beginning in September 2007. Brown signed a one-year lease which contained an arbitration clause. The lease was prefaced with a two-page table of contents which indicated there was an arbitration provision in section 22(R) on page 8. The arbitration provision was set forth as follows:

"R. Arbitration. Except for any Excluded Claim (as defined below), any dispute, claim, demand, action, proceeding or cause of action of any kind or nature whatsoever relating to this Lease, whether for damages or for injunctive or other legal, equitable or other relief, whether arising under federal, state, local, common, statutory, regulatory, constitutional or other law, between Resident and Landlord shall be settled by arbitration administered by the American Arbitration Association (the 'AAA') in the state in which the Community is located. If Landlord and Resident cannot agree on the selection of an arbitrator within 15 days after the request for arbitration, the AAA shall select an arbitrator. The determination of the arbitrator in such arbitration shall be final and binding and may be enforced in any court of competent jurisdiction. The arbitrator shall assess the costs of arbitration against the party which is not the substantially prevailing

party in such arbitration. An 'Excluded Claim' is any action, proceeding or cause of action by Landlord for the eviction of Resident from the Apartment Home, to recover possession of the Apartment Home or to collect past due Rent or other accounts due under the Lease. An Excluded Action shall be brought in a court of competent jurisdiction in the state in which the Community is located. This section shall survive the termination or expiration of this Lease."

¶ 3 Section 22(J) also referenced the arbitration provision, highlighted with underlined typeface, as follows:

"J. Jurisdiction/Governing Law/WAIVER OF JURY TRIAL. Except as set forth in the section entitled 'Arbitration,' Landlord and Resident agree that any action to enforce or interpret, or related to, this Lease shall be brought in a court of competent jurisdiction in the state in which the property is located. This Lease shall be governed by and construed in accordance with the laws of the state where the Community is located, without giving effect to the principles of conflict of laws thereof. LANDLORD AND RESIDENT HEREBY WAIVE THE RIGHT OF TRIAL BY JURY WITH RESPECT TO ANY ACTION BROUGHT TO ENFORCE OR INTERPRET, OR RELATED TO, THIS LEASE." (Emphasis in original.)

¶ 4 Plaintiff renewed this lease for a second year and also a third year. In signing her renewal addendum on August 31, 2009, the all-capital section right above plaintiff's signature provided: "RESIDENT HAS READ AND SHALL ABIDE BY ALL OF THE RULES, REGULATIONS AND AGREEMENTS IN THIS ADDENDUM AND THE LEASE."

¶ 5 Shortly after the start of her third year leasing the townhome, plaintiff was injured when a kitchen cabinet allegedly fell from the wall, striking and injuring her. Brown had previously notified the landlord of water damage to the kitchen ceiling as a result of flooding from the upstairs bathroom tub. The kitchen cabinets had recently been removed and reinstalled as part of the repair. Brown brought the instant suit for her personal injuries in circuit court.

¶ 6 Aimco moved to dismiss the complaint and compel arbitration based on the arbitration clause in Brown's lease. The circuit court agreed and granted the motion to compel arbitration. The circuit court did not, however, enter a dismissal order because it reserved the issue for later ruling and continued the matter for thirty days pending acceptance of the case by the American Arbitration Association. Brown appealed the order compelling arbitration before the circuit court revisited the issue and had an opportunity to enter a dismissal. We have jurisdiction of this appeal pursuant to Illinois Supreme Court Rule 307(a)(1). See People v. Lorillard Tobacco Co., 372 Ill. App. 3d 190, 196 (2007) (explaining that an order granting a motion to compel arbitration is injunctive in nature and subject to interlocutory appeal under Rule 307(a)(1)). See also Ill. S. Ct. R. 307(a)(1) (eff. Feb. 26, 2010).

¶ 7 ANALYSIS

¶ 8 Plaintiff argues that the circuit court erred when it compelled arbitration because the arbitration clause was both (1) procedurally unconscionable and (2) substantively unconscionable. Established precedent provides that appeals brought pursuant to Illinois Supreme Court rule 307(a)(1) (Ill. S. Ct. R. 307(a)(1) (eff. Feb. 26, 2010)) are typically reviewed only for an abuse of discretion. Glazer's Distributors of Illinois, Inc. v. NWS-Illinois, LLC, 376

Ill. App. 3d 411, 423-24 (2007) (citing Schroeder Murchie Laya Associates, Ltd. v. 1000 West Lofts, LLC, 319 Ill. App. 3d 1089, 1093 (2001)). See also Salsitz v. Kreiss, 198 Ill. 2d 1, 11 (2001) (circuit court order to compel or stay arbitration is injunctive in nature).

¶ 9 But where there is no evidentiary hearing review of a ruling on a motion to compel arbitration is de novo. People v. Lorillard Tobacco Co., 372 Ill. App. 3d 190, 196 (2007) (citing Cohen v. Blockbuster Entertainment, Inc., 351 Ill. App. 3d 772, 776 (2004)). See also Cohen, 351 Ill. App. 3d at 776 (holding that "where the trial court does not make any factual findings or the underlying facts are not in dispute, the court's decision is based upon a purely legal analysis and we review the trial court's denial of a motion to stay the proceedings and compel arbitration de novo"). A review of a trial court's construction of an arbitration agreement states a question of law that is subject to a de novo standard. Peach v. CIM Ins. Corp., 352 Ill. App. 3d 691, (2004), appeal denied, 212 Ill. 2d 536 (2004), cert. denied, 546 U.S. 1214 (2006). Here, the circuit court did not hold an evidentiary hearing and plaintiff raises issues of law. Our review is thus de novo.

¶ 10 The Illinois Uniform Arbitration Act governs and provides the following regarding validity and enforceability of arbitration agreements:

> "§ 1. Validity of arbitration agreement. A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable save upon such grounds as exist for the revocation of any contract ***." 710 ILCS 5/1 (West 2008).

¶ 11 State law contract defenses which may invalidate an arbitration agreement include fraud,

duress, or unconscionability. Carter v. SSC Odin Operating Co., LLC, 2012 IL 113204, ¶ 18 (citing Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 687 (1996)).

¶ 12 We first address plaintiff's argument that the lease at issue in this case is not the pertinent lease. Plaintiff argues in a paragraph of her reply brief that the addenda refer to and pertain to the renewal of a lease dated June 28, 2006, and not the issue which has governed this case from its inception, dated September 7, 2007. Aimco filed a motion to strike this paragraph in plaintiff's reply brief, arguing that plaintiff failed to raise the issue below. Aimco also requested we strike references to materials outside the record, with no citations to the record, concerning plaintiff's medical expenses and procedures and arbitration expenses.

¶ 13 There is no lease dated June 28, 2006 anywhere in the record. The renewal addendum references only "THE LEASE," and does not specifically refer to some purported 2006 lease. Plaintiff herself admitted in her affidavit below that she signed the lease attached to Aimco's motion to dismiss, which is dated September 7, 2007. The lease at issue in this case is the only lease that is in the record, which is the lease both signed by both plaintiff and Aimco dated September 7, 2007. Thus, we do not consider plaintiff's argument about any 2006 lease, as it is not in the record and plaintiff has admitted she signed the 2007 lease. "When a party's brief fails to comply with [the rule that a party generally may not rely on matters outside the record on appeal], a court of review may strike the brief, or simply disregard the inappropriate material." Keener v. City of Herrin, 235 Ill. 2d 338, 346 (2009). Rather than striking plaintiff's reply brief, we will disregard the inappropriate material. As we have addressed the issue herein with our order, we denied the motion to strike.

¶ 14 Plaintiff here argues that the arbitration clause in the lease is unenforceable because it is unconscionable both procedurally and substantively. A finding of unconscionability may be based on either procedural or substantive unconscionability, or a combination of both. Razor v. Hyundai Motor America, 222 Ill. 2d 75, 99 (2006). A determination whether a contractual clause is unconscionable is a matter of law. Razor, 222 Ill. 2d at 99. Whether a trial court erred when it issues an order compelling arbitration pursuant to an arbitration provision in a residential lease is reviewed de novo. Id. Also, whether an arbitration provision is procedurally or substantively unconscionable is reviewed de novo. Id. at 100. See also Tortoriello v. Gerald Nissan of North Aurora, Inc., 379 Ill. App. 3d 214, 227 (2008) (we review de novo both a court's construction of an arbitration clause and its determination on the issue of unconscionability).

¶ 15 I. Procedural Unconscionability

¶ 16 As to procedural unconscionability, plaintiff argues that: the lease was pre-printed; plaintiff had no participation in drafting or preparing the lease; there was an obvious disparity of bargaining power" between plaintiff and defendant Aimco and plaintiff had no bargaining power with respect to the terms of the lease; the arbitration clause is "hidden" in the tenth page of a 24-page lease with small print; the arbitration clause is not highlighted; the lease does not require the tenant to acknowledge the clause or to accept or reject it, and it does not contain information regarding the cost of arbitration.

¶ 17 In addition, plaintiff averred the following in an affidavit: the lease was presented to her on the same day she signed it; she was not given an opportunity to read the lease; the lease was not explained to her before she signed it; she had no input regarding the contents of the lease; she

was not aware of the arbitration clause when she signed the lease; the arbitration clause was not highlighted; the arbitration clause did [not] require her to place her initials next to it to show that she had read it and understood it; the arbitration clause does not contain any information regarding the cost of arbitration; the landlord did not mention the arbitration clause or bring it to her attention when she signed the lease; and that she did not know that the arbitration clause would bar her from bringing a lawsuit for injuries she sustained as a result of the landlord's negligence. As we explain, plaintiff's argument is unavailing.

¶ 18 In support of her argument, plaintiff relies on three cases: Kinkel v. Cingular Wireless, LLC, 223 Ill.2d 1 (2006); Razor, 222 Ill. 2d 75; and Frank's Maintenance & Engineering, Inc. v. C.A. Roberts Co., 86 Ill. App. 3d 980 (1980). We first note that Aimco argues that both Razor and Frank's Maintenance & Engineering are distinguishable because those cases involved a limitation of damages provision, not an arbitration clause. However, in Tortoriello v. Gerald Nissan of North Aurora, Inc., 379 Ill. App. 3d 214, 228 (2008), we noted that the Illinois Supreme Court in Kinkel applied the following rule equally to an attack on an arbitration provision based on procedural unconscionability. Whether a contract term is procedurally unconscionable is determined under the following analysis:

> " 'Procedural unconscionability consists of some impropriety during the process of forming the contract depriving a party of meaningful choice. [Citations.] Factors to be considered are all the circumstances surrounding the transaction including the manner in which the contract was entered into, whether each party had a reasonable opportunity to understand the terms of the contract, and whether important terms were hidden in a maze

> of fine print; both the conspicuousness of the clause and the negotiations relating to it are important, albeit not conclusive factors in determining the issue of unconscionability. [Citation.] To be a part of the bargain, a provision limiting the defendant's liability must, unless incorporated into the contract through prior course of dealings or trade usage, have been bargained for, brought to the purchaser's attention or be conspicuous.' " Kinkel, 223 Ill. 2d at 23 (quoting Frank's Maintenance, 86 Ill. App. 3d at 989–90).

¶ 19 The arbitration provision in this case satisfies the above test. Despite plaintiff's protestations to the contrary, other provisions in the lease agreement and her renewal of the lease clearly referenced the arbitration provision. The table of contents clearly indicated there was an arbitration provision. The "Jurisdiction/Governing Law/WAIVER OF JURY TRIAL" paragraph of the lease also clearly referenced an arbitration section, highlighting the term “arbitration” in underlined typeface. In signing her renewal addendum, the all-capital section right above plaintiff's signature provided: "RESIDENT HAS READ AND SHALL ABIDE BY ALL OF THE RULES, REGULATIONS AND AGREEMENTS IN THIS ADDENDUM AND THE LEASE." Thus, although plaintiff specifically argues that the lease did not require her to acknowledge or accept or reject the clause, in executing her renewal plaintiff specifically agreed that she (1) read all the agreements in the lease, and (2) agrees to abide by them.

¶ 20 As to plaintiff's argument that she had no opportunity to read the lease, there is no indication that she even asked for an opportunity to read the lease, or that the lessor forced her to sign the lease immediately. Even if that were the case, plaintiff renewed the lease for an additional two years. Plaintiff thus had at least an additional two years to read the lease and all

its provisions. She signed renewal addendums and did not raise any issue regarding any of the lease terms at the time of each renewal, including the operative renewal period which covers her alleged injuries in this case.

¶ 21 Moreover, although we do not rely on this fact in reaching our conclusion, we note plaintiff did exercise the lease provision regarding repairs by notifying the landlord of the water damage which led to the reinstallation of the kitchen cabinets that allegedly caused her injuries in this case. Thus, plaintiff has demonstrated some familiarity with the contract.

¶ 22 Not only do the facts not support her case, but plaintiff's citations also offer her no support. The holding in Kinkel did not rest on procedural unconscionability but, rather, substantive unconscionability. The court in Kinkel found that although there was some "degree" of procedural unconscionability where the consumer was not advised of the cost of arbitration in the contract, this degree was not sufficient to find the class action waiver in arbitration unenforceable based on procedural unconscionability. Kinkel, 223 Ill. 2d at 27. As we discuss in the next section, the court's holding rested on substantive unconscionability.

¶ 23 The arbitration clause in this case also bears no resemblance to the limitation of damages provision in Frank's Maintenance & Engineering. In Frank's Maintenance & Engineering, the limitation of damages provision was on the reverse side of a purchase agreement, was stamped over and practically illegible and appeared to read "No conditions of sale on reverse side." (Emphasis added.) Frank's Maintenance & Engineering, 86 Ill. App. 3d at 983. Here the arbitration clause, though in small print, was legible and not confusing.

¶ 24 Reliance on Razor is similarly unavailing, as the limitation on damages provision in a

vehicle sales contract in that case was contained in the owner's manual of the vehicle, inside the glove box, and the consumer was not able to read the provision at any time prior to the delivery of the vehicle. Razor, 222 Ill. 2d at 100. The Illinois Supreme Court found that the lack of any evidence that the disclaimer of consequential damages in the contract was at least made available to the plaintiff "tip[ped] the balance in plaintiff's favor" of unconscionability. Id. Procedural unconscionability was found "where plaintiff *** testified that she never saw the clause; nor is there any basis for concluding that plaintiff could have seen the clause, before entering into the sale contract." (Emphasis in original.) Id. at 101-02. In this case, in contrast, plaintiff had the contract in hand and could have read it.

¶ 25 We note that the "degree" of procedural unconscionability found in Kinkel was undermined by the following factors, which are similar to the instant case:

> "Considering the totality of the circumstances, we conclude that the facts and circumstances of Razor and Frank's Maintenance are largely distinguishable from the present case. Plaintiff did sign the front page of the service agreement and she did initial an acknowledgment provision on the front of the form, stating that she had read the terms and conditions on the back. There is no dispute that the terms and conditions were in her possession and she either read them or could have read them if she had chosen to do so." Kinkel, 223 Ill. 2d at 26.

¶ 26 Similarly here, the contract was in plaintiff's possession and she either read them or could have read them had she chosen to do so. Here, the arbitration clause is part of a lease that plaintiff had the opportunity to read had she wished to, the arbitration clause was brought to

plaintiff's attention elsewhere in the contract, and there was no other action by Aimco that can be said to constitute fraud or other wrongful conduct. The table of contents and the "WAIVER OF JURY TRIAL" provision both referred to the arbitration provision. Plaintiff also signed the addendum, agreeing that she read and agreed to the lease terms.

¶ 27 The unequal bargaining power alleged by plaintiff here stems only from the fact that plaintiff was the lessee and Aimco is a corporate lessor. This is the case with many lease agreements and is not, without some wrongful conduct, a basis for finding the valid arbitration agreement here procedurally unconscionable.

¶ 28 We note that lease forms such as the one in the instant case are so common that tenants are by now well familiar with them. While the lease here is indeed a pre-printed lease form with small font and the arbitration clause was not on the first page, to hold that the arbitration provision here, without any further wrongdoing, is unconscionable would absolve consumers from their responsibility to read the contracts they enter into, including leases. The Illinois Supreme Court's further explanation in Kinkel is instructive:

> "The Cingular service agreement is a contract of adhesion. The terms, including the arbitration clause and the class action waiver therein, are nonnegotiable and presented in fine print in language that the average consumer might not fully understand. Such contracts, however, are a fact of modern life. Consumers routinely sign such agreements to obtain credit cards, rental cars, land and cellular telephone service, home furnishings and appliances, loans, and other products and services. It cannot reasonably be said that all such contracts are so procedurally unconscionable as to be unenforceable." Kinkel,

223 Ill. 2d at 26.

¶ 29 As the court in Tortoriello explained, contracts of adhesion "are not per se unconscionable from a procedural standpoint ***[;] some added coercion or overreaching is necessary." Tortoriello, 379 Ill. App. 3d at 233. Here there is no allegation of coercion or overreaching or any other wrongdoing by Aimco.

¶ 30 Plaintiff's argument is insufficient to establish that the arbitration agreement was procedurally unconscionable. We therefore hold the circuit court did not err in refusing to find procedural unconscionability and compelling arbitration.

¶ 31 II. Substantive Unconscionability

¶ 32 Plaintiff also argues the arbitration clause was substantively unconscionable, but cites only to Kinkel, providing no other authority, thus rendering plaintiff's argument so inadequate as to almost constitute waiver of the argument. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008). Even considering plaintiff's argument, we find the arbitration provision here is not substantively unconscionable.

¶ 33 In Razor, the Illinois Supreme Court stated that substantive unconscionability refers to terms that are "inordinately one-sided in one party's favor." Razor, 222 Ill. 2d at 100. The Illinois Supreme Court later revisited the issue of substantive unconscionability and the definition of substantive unconscionability as adopted in Kinkel is as follows:

> " '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 disparity.' " Kinkel, 223 Ill. 2d at 28 (citing Hutcherson v. Sears Roebuck & Co., 342 Ill. App. 3d 109, 121 (2003), quoting Maxwell v. Fidelity Financial Services, Inc., 184 Ariz. 82, 89 (1995)).

¶ 34 Kinkel is distinguishable because first, only the class action waiver part of the arbitration clause in Kinkel was found to be substantively unconscionable, not the entire arbitration clause as is alleged in this case. In Kinkel, a plaintiff cellular telephone customer brought suit against the defendant Cingular Wireless company because of a dispute concerning a $150 early termination fee and the defendant cellular telephone company sought to compel arbitration. The Illinois Supreme Court held that the class action waiver portion of the arbitration provision was unconscionable because it did not put her on notice that she would bear any of the costs associated with arbitration. Kinkel, 223 Ill. 2d at 26. The agreement merely stated that "fee information" was available from Cingular or the AAA "upon request." Id. The Illinois Supreme Court also found the class action waiver portion of the arbitration provision unconscionable because it failed to reveal the cost of arbitration would be $125, and where the underlying claim involved actual damages of $150, it was cost-prohibitive. Kinkel, 223 Ill. 2d at 44.

¶ 35 Second, Kinkel is distinguishable because the arbitration provision in this case clearly sets forth that the party who is "not the substantially prevailing party" shall bear the costs, thus not prohibiting plaintiff from bringing a claim in arbitration. Although plaintiff argues in her brief that the provision does not set forth what the cost is in bringing arbitration, the provision clearly provides that the substantially prevailing party will be awarded the costs.

¶ 36 Plaintiff provides the definition of substantive unconscionability but does not explain how the provision here is substantively unconscionable. Plaintiff merely repeats the same facts regarding her procedural unconscionability argument (that the provision is “hidden” in a 24-page lease, etc.).

¶ 37 The only additional fact plaintiff raises in her substantive unconscionability argument is that "[t]he lease is one-sided because the landlord may bring all of its disputes with the tenant in a civil court, but the tenant may only bring her disputes to arbitration." This assertion is incorrect. As is clearly provided in the arbitration clause, the only claims the landlord can bring outside of arbitration are claims for eviction, to recover possession, and to collect past due rent.

¶ 38 We can find no precedent holding that an arbitration provision in a lease is substantively unconscionable. In fact, the majority of cases have found that similar arbitration clauses in contracts are not substantive unconscionable. See Hubbert v. Dell Corp., 359 Ill. App. 3d 976 (2005); Hutcherson v. Sears Roebuck & Co., 342 Ill. App. 3d 109 (2003); Tortoriello v. Gerald Nissan of North Aurora, Inc., 379 Ill. App. 3d 214 (2008); Bess v. DirecTV, Inc., 381 Ill. App. 3d 229 (2008), appeal denied 229 Ill. 2d 618 (2008).

¶ 39 We note the Illinois Uniform Arbitration Act "embodies a legislative policy favoring enforcement of agreements to arbitrate future disputes." ACME-Wiley Holdings, Inc. v. Buck, 343 Ill. App. 3d 1098, 1103 (2003). "It is a well-established principle that arbitration is a favored alternative to litigation by state, federal and common law because it is a 'speedy, informal, and relatively inexpensive procedure for resolving controversies arising out of commercial transactions.' " (Citations omitted.) Board of Managers of Courtyards at Woodlands

Condominium Ass'n v. IKO Chicago, Inc., 183 Ill. 2d 66, 71 (1998). There is no basis to conclude that the arbitration provision in this case is either procedurally or substantively unconscionable. The circuit court did not err in entering the order to compel arbitration.

¶ 40 Finally, although Aimco also addresses a waiver argument raised by plaintiff below, plaintiff herself has not raised this argument on appeal and thus she has forfeited it in this appeal and we will not consider it.

¶ 41 CONCLUSION

¶ 42 The circuit court did not err in entering the order to compel arbitration. There arbitration provision in the lease is not procedurally unconscionable, despite plaintiff's objection that it was "hidden" in a 24-page pre-printed form lease with small font. Plaintiff was not prevented from reading the lease and its terms, including the arbitration provision, the arbitration provision was referenced in other sections of the lease, thus clearly drawing attention to it, and plaintiff had an additional two years to read the terms of the lease before renewing it. The arbitration provision also was not so one-sided as to be substantively unconscionable where the landlord and tenant were both bound to arbitrate, except for actions by the landlord to evict or for possession or past due rent, and it provided that the substantially prevailing party would be awarded costs.

¶ 43 Affirmed.