2017 IL App (1st) 162275-U

FOURTH DIVISION
November 22, 2017

No. 1-16-2275

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

UNITED INVESTMENT GROUP, LLC, and PATRICIA MOHAN,	)	Appeal from the Circuit Court of Cook County
Plaintiffs-Appellants,	)	
v.	)	No. 14 L 3704
BEGGARS PIZZA FRANCHISE CORPORATION,	)	Honorable Thomas R. Mulroy
Defendant-Appellee.	)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice Burke and Justice Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court's judgment affirmed. Summary judgment on breach-of-contract claim properly granted where parties' franchise agreement contained damages-limitation provision excluding recovery for loss of profits. Provision was neither procedurally nor substantively unconscionable.

¶ 2 Plaintiffs, United Investment Group, LLC (UIG), and Patricia Mohan (collectively, plaintiffs) appeal the trial court's grant of summary judgment in favor of defendant Beggars Pizza Franchise Corporation on plaintiffs' breach of contract claim. Plaintiffs had contended that defendant breached the parties' franchise agreement by allowing other franchisees (separate

corporations that were owned in part by defendant's president and vice-president) to intentionally deliver pizza into plaintiffs' protected delivery area. Plaintiffs sought damages for lost profits.

¶ 3 The trial court concluded that plaintiffs could not recover for any breach of contract, as the franchise agreement expressly excluded recovery for consequential damages, including lost profits. The court also found that this damages-limitation provision was neither procedurally nor substantively unconscionable.

¶ 4 Plaintiffs filed a timely notice of appeal from the circuit court's order granting summary judgment. For the reasons that follow, we affirm the judgment of the circuit court.

¶ 5 I. BACKGROUND

¶ 6 Initially, we note several deficiencies in plaintiffs' brief. First, their opening brief does not comply with Illinois Supreme Court Rule 341 (Ill. S. Ct. R. 341 (eff. Feb. 6, 2013)), as it contains no statement of facts. Rule 341(h)(6) requires a statement of facts that contains "the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment, with appropriate reference to the pages of the record on appeal." Plaintiffs' brief includes, instead, a "Statement of the Case" that does not contain sufficient facts and is replete with argument. Nevertheless, we have the requisite understanding of the case based on our review of the record and the statement of facts contained in defendant's brief.

¶ 7 Plaintiffs' brief also does not comply with Illinois Supreme Court Rule 342. Ill. S. Ct. R. 342 (eff. Jan. 1, 2005). Supreme Court Rule 342(a) requires that an appellant's brief include, in "an appendix, *** a complete table of contents, with page references, of the record on appeal." The record consists of ten volumes, yet plaintiffs' appendix omitted this table of contents. As defendant notes, we may dismiss an appeal on this basis alone. See *Oruta v. B.E.W. &*

Continental, 2016 IL App (1st) 152735, ¶ 29. But defendant's appendix contains a table of contents of the record, and we will consider the merits of this appeal.

¶ 8 Defendant, Beggars Pizza Franchise Corporation, was formed in 2004 to offer franchises for Beggars Pizza restaurants. UIG was formed in 2007 to operate a Beggars Pizza franchise at 10314 South Halsted Street in Chicago. Patricia Mohan owns and operates UIG, but when UIG became a franchisee in 2008, the franchise agreement indicated that Patricia Mohan's son, Ondraze Mohan, was the 100% owner of UIG. After protracted litigation with her son, Patricia Mohan took full control of the franchise. In 2011, the franchise agreement was amended to reflect her 100% ownership.

¶ 9 The franchise agreement contains several provisions regarding deliveries. Section 1.1.1 of the franchise agreement states, in pertinent part:

> "Beggars grants to Franchise, during the Term, the non-exclusive franchise to operate a Restaurant at the Location, using the Beggars Marks, and to promote and sell Approved Products and related services from the Restaurant at the Location, and to deliver Approved Products produced at the Restaurant throughout the Delivery Area. Franchisee may not operate the Restaurant except at the Location, and may not deliver products produced at the Restaurant or use Beggars Marks except within the Delivery Area."

¶ 10 Section 1.5 states, in relevant part, that a franchisee "may not make deliveries of products produced at the Restaurant to any points outside the Delivery Area, except as is expressly permitted by Beggars in writing."

¶ 11 Section 1.6 of the franchise agreement states:

> "Protected Areas. During the Term, Beggars shall not develop or operate, or allow any other franchisee to develop or operate a Restaurant at the Location or at any point within the Delivery Area described on Schedule 2. Furthermore, as long as Franchise is providing Adequate Delivery Service throughout the Delivery Area, Beggars shall not provide delivery service, and shall not authorize any other Beggars franchise to provide delivery service, for Approved Products to any point within the Delivery Area."

¶ 12 Plaintiffs filed their original ten-count complaint against defendant, claiming that defendant intentionally violated the franchise agreement by allowing other franchisees to deliver within plaintiffs' territory. The trial court dismissed seven of the ten counts, denying the motion to dismiss counts for breach of contract (count I), unjust enrichment (in the alternative) (count II), and violation of the Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 *et seq*. (West 2014) (count IV).

¶ 13 After discovery closed, defendant moved for summary judgment. The court took the motion under advisement but also allowed plaintiffs to file an amended complaint.

¶ 14 The seven-count amended complaint sounded in breach of contract (count I); unjust enrichment (in the alternative) (count II); civil conspiracy (count III); interference with contract relations (count IV); accounting (count V); fraud (count VI); and piercing the corporate veil (count VII). The trial court granted defendant's motion to dismiss counts IV and VI, a ruling not at issue on appeal.

¶ 15 Defendant then moved for summary judgment on all counts, incorporating its previous motion for summary judgment regarding some of the previous counts. After hearing argument, the trial court granted summary judgment in favor of defendant on all counts of the amended complaint.

¶ 16 Regarding the count for breach of contract, the trial court found that there were no facts to support a finding that plaintiffs were damaged by any alleged breach. The court concluded that plaintiffs could not recover for any breach of contract, as the franchise agreement expressly excluded recovery for consequential damages, which included lost profits. The court also found that this damages-limitation provision was neither procedurally nor substantively unconscionable.

¶ 17 The trial court later denied plaintiffs' motion to reconsider. Plaintiffs appeal but raise only the issue of the trial court's ruling on the breach-of-contract count.

¶ 18 II. ANALYSIS

¶ 19 Summary judgment is proper only where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2012). The court must strictly construe the pleadings, depositions, admissions, and affidavits against the movant and liberally construe them in favor of the opponent. *Mashal v. City of Chicago*, 2012 IL 112341, ¶ 49. Because summary judgment is a drastic means of disposing of litigation, it should be granted only when the moving party's right is clear and free from doubt. *Id*.

¶ 20 The purpose of summary judgment is not to try a question of fact, but rather to determine whether a genuine issue of material fact exists. *Adams v. Northern Illinois Gas Co*., 211 Ill. 2d 32, 42-43 (2004). A genuine issue of material fact exists where the material facts are disputed or the material facts are undisputed but reasonable persons might draw different inferences from those undisputed facts. *Carney v. Union Pacific Railroad Co*., 2016 IL 118984, ¶ 25. The nonmoving party need not prove her case at the summary judgment stage, but must present a

factual basis that would arguably entitle her to a judgment at trial. *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 12.

¶ 21 We review *de novo* the trial court's grant of summary judgment. *AMA Realty Group of Illinois v. Melvin M. Kaplan Realty, Inc.*, 2015 IL App (1st) 143600, ¶ 18. A trial court's interpretation of a contract presents a question of law that we also review *de novo*. *Asset Recovery Contracting, LLC v. Walsh Construction Co. of Illinois*, 2012 IL App (1st) 101226, ¶ 57. Whether a contractual provision is unconscionable is likewise a question of law, warranting *de novo* review. *Kinkel v. Cingular Wireless LLC*, 223 Ill. 2d 1, 22 (2006).

¶ 22 The essential elements of a breach of contract include: (1) the existence of a valid and enforceable contract, (2) performance by the plaintiff, (3) breach of the contract by the defendant, and (4) damages or injury to the plaintiff as a result of the breach. *Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶ 27. Here, the first two elements were not at issue. The last two elements were disputed, and the trial court's decision was based solely on plaintiffs' inability to satisfy the fourth element based on the damages-limitation clause in the franchise agreement. We begin our analysis there.

¶ 23 Generally, the proper measure of damages for breach of contract is the amount of money that will place the injured party in as satisfactory a position as he or she would have been in had the contract been performed. *Cress v. Recreation Services, Inc.*, 341 Ill. App. 3d 149, 185 (2003). But as long as no public-policy bar exists, parties can limit their right to remedies and damages for breach of contract by the terms expressed in their agreement. *Id.*; accord *First National Bank & Trust Co. of Evanston v. First National Bank of Skokie*, 178 Ill. App. 3d 180, 188 (1988) ("The contracting parties may, within reasonable limits, exclude or restrict the remedies available for a breach of the contract for a financial loss."). Thus, a plaintiff is generally entitled to recover

damages under a contract theory only to the extent provided by the terms of the written instrument. *Id*.; *Asset Recovery Contracting, LLC v. Walsh Construction Co. of Illinois,* 2012 IL App (1st) 101226, ¶ 102. As our supreme court has explained, its decisions "reflect a widespread policy of permitting competent parties to contractually allocate business risks as they see fit." *McClure Engineering Associates, Inc. v. Reuben H. Donnelley Corp*., 95 Ill. 2d 68, 72 (1983). Here, the parties agreed to contractually limit damages.

¶ 24 Section 18.3 of the franchise agreement contains the following damages-limitation clause:

> "Franchisee's Right to Recover Damages. Franchisee's right to recover direct damages whether in contract or in tort, arising out of Beggars' breach of any contractual or legal duty or obligation imposed upon Beggars under this Agreement or otherwise, shall be limited to and in no event shall exceed the amount Franchisee has paid to Beggars in Ongoing Franchise Fees under this Agreement. Such remedy shall be the sole and exclusive remedy of Franchisee and under no circumstances shall the Franchisee be entitled to recover, and Beggars shall not be responsible to Franchisee for, any indirect, incidental, consequential or special damages (including without limitation, economic loss, loss of profits, down time and/or loss of business opportunities) arising or resulting from any action or inaction on the part of Beggars or the breach by Beggars of any contractual or other duty or obligation arising out of this Agreement or otherwise."

¶ 25 This court has upheld contractual limitations on damages. See, *e.g.*, *Asset Recovery Contracting*, 2012 IL App (1st) 101226 (affirming trial court's decision striking claim for consequential damages). "Contractual limitations or exclusions of consequential damages will be upheld unless to do so would be unconscionable." *Razor v. Hyundai Motor America*, 222 Ill. 2d

75, 99 (2006). A determination of unconscionability may be based on either procedural or substantive unconscionability, or a combination of both. *Kinkel v. Cingular Wireless LLC*, 223 Ill. 2d 1, 21 (2006).

¶ 26 Plaintiffs argue the damages-limitation provision is procedurally and substantively unconscionable.

¶ 27 We begin with procedural unconscionability, which "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." (Internal quotation marks omitted.) *Id.* (quoting *Razor v. Hyundai Motor America*, 222 Ill. 2d 75, 100 (2006)). It "consists of some impropriety during the process of forming the contract depriving a party of a meaningful choice." (Citation omitted.) *Id*. at 23. Factors to be considered include, though are not limited to:

> " '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.' " *Id*. at 23 (quoting *Frank's Maintenance & Engineering, Inc. v. C.A. Roberts Co.*, 86 Ill.App.3d 980, 989 (1980)).

¶ 28 On at least two occasions, our supreme court has noted that " '[c]ourts are more likely to find unconscionability when a consumer is involved, when there is a disparity in bargaining

power, and when the consequential damages clause is on a pre-printed form." *Kinkel*, 223 Ill. 2d at 24 (quoting *Razor*, 222 Ill. 2d at 100) (additional citation omitted).

¶ 29 We agree with the trial court that plaintiffs failed to establish procedural unconscionability as a matter of law. First, it is undisputed that plaintiffs were a corporate entity engaging in a negotiation with another corporate entity on a complex commercial transaction with a significant financial commitment. This was not a contract of adhesion, whereby an unsophisticated consumer purchases a cell phone or car warranty and is handed a double-sided, pre-printed contract with fine-print language limiting one side's liability or requiring arbitration of any claims.

¶ 30 The undisputed evidence is that negotiations over this contract took place from April 2007 until its execution on January 24, 2008. And while plaintiffs claim that UIG was never represented by counsel in negotiating and reading the contract—a claim, as defendant notes, that is unsupported in the record—that is a decision that UIG made of its own accord. A contract negotiated over a nine-month period between two corporations is not one where it could be plausibly said that plaintiffs were "depriv[ed] *** of a meaningful choice" in whether to sign it. *Kinkel*, 223 Ill. 2d at 23; see also *Rodriguez v. Tropical Smoothie Franchise Dev. Corp.*, 3:11-CV-359, 2012 WL 12770, at *3 (S.D. Ohio Jan. 4, 2012) (applying Florida law) (distinguishing consumer contracts from franchise agreements: "The general public does not, as a matter of course, sign franchise agreements. Unlike entering into an agreement for cellular telephone service, a franchise agreement is a significant business venture, and with it comes significant financial risk and responsibility.").

¶ 31 Second, the language of the damages-limitation provision is unambiguous. It could not be clearer. The provision contains both a limitation of remedy for direct damages and an exclusion of consequential damages.

¶ 32 Plaintiffs claim otherwise, arguing that words like "damages" are unknown to the lay person, especially without any specific reference to a lawsuit, "unless the reader is a lawyer." We cannot accept the proposition that the word "damages" in a complex transactional document, such as this one, is ambiguous. And even if it were, the corporate entity had every opportunity to seek counsel if there were some language that it found difficult to understand.

¶ 33 The law does not exist to protect contracting parties from willingly signing contracts containing terms they do not understand; the doctrine of procedural unconscionability merely ensures that parties have "a reasonable opportunity to understand the terms of the contract." *Id*. It does not relieve a party of its "duty to learn or know the contents of a written contract before he signs it." *Magnus v. Lutheran General Health Care System*, 235 Ill. App. 3d 173, 184 (1992); see also *Urban Sites of Chicago, LLC v. Crown Castle USA*, 2012 IL App (1st) 111880, ¶ 41 (plaintiff, "an experienced and sophisticated commercial landlord, was under a duty to read the 2005 agreement and to learn of the contents of the attached documents before signing them."). As long as a party has a reasonable opportunity to understand the contents of the contract, as here, "a party to an agreement is charged with knowledge of and assent to the agreement signed." *Melena v. Anheuser-Busch, Inc*., 219 Ill. 2d 135, 150 (2006).

¶ 34 Nor was the damages-limitation provision "hidden in a maze of fine print," as plaintiffs suggest. It is found in a separate section of the contract, no different than any other section. It is a twelve-line provision bearing the title "Franchisee's Right to Recover Damages." And not only is it clearly designated, but it is also separately listed in the table of contents to the Agreement,

no different than any other section. There is nothing inconspicuous or confusing about this provision. It is not procedurally unconscionable.

¶ 35 Plaintiffs also argue that the damages-limitations provision is substantively unconscionable because it is inordinately one-sided in defendant's favor. "An unconscionable bargain is one which no person in his senses would make and which no fair and honest person would accept." *Hartford Fire Insurance Co. v. Architectural Management, Inc*., 194 Ill. App. 3d 110, 116 (1990). As our supreme court has explained:

> " 'Substantive unconscionability concerns the actual terms of the contract and examines the relative fairness of the obligations assumed. 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 (quoting *Maxwell v. Fidelity Financial Services, Inc*., 184 Ariz. 82, 89, 907 P.2d 51, 58 (1995)).

¶ 36 Obviously, this provision favored defendant, not plaintiffs. But that does not, in and of itself, make it substantively unconscionable. Many provisions in a contract, viewed in isolation, will favor only one of the two parties. Viewing the franchise agreement as a whole, we cannot say that this one provision is so lopsided that " no person in his senses" would agree to it. *Hartford Fire Insurance Co.*, 194 Ill. App. 3d at 116.

¶ 37 Courts have upheld similar limitation-of-damages provisions against claims of substantive unconscionability. *McClure Engineering Associates, Inc. v. Reuben H. Donnelley Corp.*, 95 Ill. 2d 68, 71, 73 (1983) (provision stated that liability of phone directory was "limited to the charges for the publication of such issue of the item of advertising involved, excluding charges for cuts, engravings or electrotypes."); *BB Syndication Services, Inc. v. LM Consultants,*

Inc., 09-CV-1268, 2011 WL 856646, at *5 (N.D. Ill. Mar. 7, 2011) (applying Illinois law) (consultant agreement limited liability for "all claims arising out of, in connection with, or resulting from the performance of this Agreement" to amount of fees paid under agreement); *Willmott v. Federal Street Advisors, Inc.*, 05 C 1124, 2006 WL 3743716, at *7 (N.D. Ill. Dec. 19, 2006) (applying Illinois law) (agreement absolved bank of any liability for "special, indirect, consequential, incidental, or punitive damages").

¶ 38 We agree with defendant that "the waiver is one of many interrelated provisions that UIC agreed to abide by in exchange for the privileges of using Beggar's Pizza's trademarks, trade names, service marks, trade dress, recipes, and business infrastructure to operate its franchise." We agree with the trial court that the damages-limitation provision is not substantively unconscionable.

¶ 39 Finally, in their reply brief, plaintiffs contend for the first time that defendant's corporate veil should be pierced. Our supreme court has repeatedly held that the failure to argue a point in the appellant's opening brief results in forfeiture of the issue. See *Vancura v. Katris*, 238 Ill. 2d 352, 369 (2010) (and cases cited therein). That is not a mere technical requirement; it would be fundamentally unfair for us to consider this question without defendant having had an opportunity, in the regular course of briefing, to address the argument. Nor are we inclined to re-write the Supreme Court Rules on appellate procedure because plaintiffs decided to add a new argument at the last moment.

¶ 40 In any event, we would find no merit in plaintiffs' new argument. Given that we are affirming the grant of summary judgment in defendant's favor on the contract claim, and plaintiffs have not appealed their losses on any of their other claims, whether plaintiffs could pierce the corporate veil is irrelevant. Piercing the corporate veil is not an independent cause of

action but, rather, is merely a means to impose liability once an underlying cause of action has been successfully established. *Buckley v. Abuzir*, 2014 IL App (1st) 130469, ¶ 9. As plaintiffs have prevailed on no theory that would entitle them to relief against the corporate entity in the first instance, the piercing of any corporate veil is moot.

¶ 41 III. CONCLUSION

¶ 42 For the reasons stated above, we affirm the circuit court's decision granting summary judgment in favor of defendant.

¶ 43 Affirmed.