THIRD DIVISION
September 27, 2017

No. 1-17-1070

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DEBRA LYNN ROSS, as the Special Representative of the Estate of Sherwin P. Ross, Deceased,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellant,	)	
v.	)	No. 16 L 3677
JAY HESDORFFER, MARIETTA HESDORFFER, and MORGAN STANLEY	)	
Defendants-Appellees	)	
(Jeffrey B. Stolberg, Nicholas Frisone, Ronald G. Pestine, and Marc. D. Sherman,	)	Honorable John C. Griffin,
Defendants).	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Cobbs and Justice Fitzgerald Smith concurred in the judgment.

ORDER

¶ 1 *Held*: The judgment of the circuit court of Cook County which granted defendants' motion to stay proceedings and compel arbitration is reversed; where plaintiff alleged in the complaint and in reply to defendants' motion to compel arbitration that the signer of the arbitration agreement suffered from a mental impairment and therefore lacked the mental capacity to sign an arbitration agreement, the trial court was required to conduct

an evidentiary hearing to determine whether an agreement to arbitrate was validly formed before ordering a stay and sending the matter to arbitration.

¶ 2 Debra L. Ross, on behalf of Sherwin P. Ross, filed a complaint in the circuit court of Cook County against defendants Jay Hesdorffer, Marietta Hesdorffer, and Morgan Stanley, who are parties to this appeal, and defendants Jeffrey Stolberg, Nicholas Frisone, Ronald Pestine, and Marc Sherman, who are not parties to this appeal. Sherwin died in August 2016, and the trial court granted a motion to substitute Debra L. Ross, as special representative of the estate of Sherwin P. Ross, as plaintiff and to file an amended complaint. Plaintiff's amended complaint states Jay Hesdorffer and Marietta Hesdorffer were a senior vice-president and first vice-president of Morgan Stanley and were Sherwin's financial consultants. The amended complaint alleges claims against Jay and Marietta for breach of fiduciary duty (count VI), fraudulent concealment (count VII), fraud (count VIII), loss of income (count IX), and conspiracy (count X). The amended complaint also alleges breach of fiduciary duty against Morgan Stanley (count XI).

¶ 3 Jay, Marietta, and Morgan Stanley (hereinafter, "defendants") filed a motion seeking an order compelling plaintiff to proceed to an arbitration "in accordance with the parties' written arbitration agreement" and to stay the proceedings as to them pending the outcome. The motion states that Sherwin maintained brokerage accounts with Salomon Smith Barney (SSB), which was later acquired by Morgan Stanley, and Sherwin also maintained individual accounts at SSB. The motion alleges that in December 1999 Sherwin executed an Account Application and Client Agreement (hereinafter client agreement) with SSB, and the client agreement contains "an arbitration provision which provides for the arbitration of this dispute." The motion further alleges that in 1990 Sherwin executed account agreements containing arbitration clauses in connection with his individual brokerage accounts. The motion prayed for an order compelling plaintiff to arbitrate the claims asserted against defendants.

¶ 4 The trial court granted defendants' motion. Plaintiff filed a motion to reconsider, which the trial court denied.

¶ 5 For the following reasons, we reverse and remand for further proceedings.

¶ 6 BACKGROUND

¶ 7 The following are taken from plaintiff's amended complaint (complaint). In 1984, an account was established at Morgan Stanley for Sherwin's benefit and later, a second account was established for Sherwin's benefit. The will of Samuel Ross, Sherwin's father, provided that upon his death (Samuel died in November 1985) the residue of Samuel's estate was to pour over into the Samuel Ross Living Trust, which was then to be divided into two shares for the benefit of Shirley Ross, who was Samuel's wife and Sherwin's mother. Shirley's will provided that upon her death the residue of her estate would be conveyed to the Shirley Ross Living Trust. Upon Shirley's death the assets of the Shirley Ross Living Trust were to be distributed equally, in trust, for the benefit of Samuel and Shirley's two sons: Sherwin and Eliyahu Ross. In November 1999, Sherwin executed the Sherwin P. Ross Revocable Trust. An account was established at Morgan Stanley for Sherwin's trust, with Sherwin as trustee, "without Sherwin's understanding the need for this account." The complaint alleges a number of checks were drawn on the accounts of Samuel and Shirley's trusts and transactions involving those trusts' accounts occurred after the trust assets were supposed to have been distributed. The complaint also alleges a number of checks were drawn on Sherwin's accounts that Sherwin did not write, and transfers among Sherwin's various accounts, and transfers between Sherwin's accounts and accounts belonging to Sherwin's brother Eliyahu, occurred that Sherwin did not authorize.

¶ 8 Plaintiff's complaint further alleges as follows:

> "Sherwin had a confirmed diagnosis of a mental impairment resulting from a congenital condition that impairs his mental ability, as well as other

congenital physical conditions, which impaired his ability to independently manage his financial resources. Sherwin resided nearly his entire adult life with his mother until her death on October 13, 1998. His basic needs and housing expenses were provided by his mother. He was residing in an assisted living format in Chicago. Due to their long-term relationships with the Ross family, the Defendants knew about Sherwin's impairments and did not offer any independent representation in his Trust Account matters, nor provide guidance to their client's family as to the need to have such independent representation."

¶ 9 Defendants filed a motion to compel arbitration and stay the proceedings alleging that on or about December 5, 1999, Sherwin executed the client agreement. The client agreement contains the following relevant provisions:

"I agree that all claims or controversies, whether such claims or controversies arose prior, on or subsequent to the date hereof, between me and SSB and/or any of its present or former officers, directors or employees concerning or arising from (i) any account maintained by me with SSB individually or jointly with others in any capacity; (ii) any transaction involving SSB or any predecessor firms by merger, acquisition, or other business combination and me, whether or not such transaction occurred in such account or accounts; or (iii) the construction, performance or breach of this or any other agreement between us, any duty arising from the business of SSB or otherwise, shall be determined by arbitration before, and only before, any self-regulatory organization or exchange of which SSB is a member. I may elect which of these arbitration forums shall hear the matter by sending a registered letter or telegram addressed to Salomon Smith Barney Inc. at 388 Greenwich Street New York,

> N.Y. 10013-2396, Attn. Law Department. If I fail to make such election before the expiration of five (5) days after receipt of a written request from SSB to make such election, SSB shall have the right to choose the forum.
>
> * * *
>
> The provisions of the Agreement shall be continuous, shall cover individually and collectively all accounts which I may open or reopen with SSB and shall inure to the benefit of SSB's present organization, and any successor organization or assigns, and shall be binding upon my heirs, executors, administrators, assigns or successors in interest. *** Except for statutes of limitation applicable to claims, this Agreement and all the terms herein shall be governed and construed in accordance with the laws of the State of New York without giving effect to principles of conflict of laws."

¶ 10 Defendants' motion to compel further asserts Sherwin executed two account agreements that contain similar arbitration clauses "in connection with maintaining his individual brokerage accounts." The 1990 account agreement documents to which defendants refer are titled "Security Account Third Party Discretionary Authorization" and are authorizations for a third party (Howard Reich) to engage in transactions on Sherwin's accounts.

¶ 11 Plaintiff filed a response to defendants' motion and again alleged Sherwin suffered from a mental impairment and lacked the mental capacity to enter into any arbitration agreement. Defendants filed a reply to plaintiff's response. In reply, defendants argued plaintiff failed to prove Sherwin lacked the mental capacity to enter the agreements containing the arbitration clauses. Defendants argued that three correspondence allegedly from Sherwin, along with "an absence of allegations that [Sherwin] has ever been determined to be disabled by a court or under any type of legal guardianship[,] prevent Plaintiff from establishing mental incapacity at the time

of executing the agreements containing the arbitration provisions." The correspondences were two letters in which Sherwin allegedly corresponded with defendants about his accounts and a third letter in which Sherwin allegedly requested documents from another (non-appellee) defendant. The third letter was attached to that party's motion to dismiss the complaint, which is not a subject of this appeal.

¶ 12 At a hearing the trial court heard arguments on defendants' motion to compel. At the beginning of the hearing, the court stated as follows:

> "THE COURT: The case is up on your motion to stay and compel arbitration. I've read the motion, the response, the reply, the—re-read the complaint. This case is about Sherwin Ross had an account and this is a lawsuit against a number of people: the attorney, the accountant, and the—Morgan Stanley and the people who work there. So the plaintiff says that the motion should be denied because the clause is unconscionable, the claims fall outside the terms of the arbitration provision, and Mr. Ross was mentally incapable of entering into the agreement.
>
> So I've read it all, but I'd be happy to hear anything you'd like to add."

¶ 13 The parties' attorneys proceeded to argue their respective positions. Defendants argued, in part, that it was plaintiff's burden to establish Sherwin's incapacity and that defendants had attached exhibits to their reply in support of their motion to compel that were contrary to plaintiff's claim. Specifically, defendants attached letters Sherwin allegedly wrote and signed himself and a check he allegedly wrote and signed. Defendants also pointed to an exhibit attached to a motion to dismiss plaintiff's complaint filed by a defendant who is not a party to this appeal. That exhibit was a "long memorandum" Sherwin allegedly typed out and signed, which was notarized. Defendants argued "what we do see, the limited evidence at this point,

clearly shows that there's no—there was no such mental incapacity." In response, plaintiff argued, in part, as follows:

> "It's interesting to note and I find very—almost preposterous that the defendants have asserted six documents that they've put forth in their pleadings claiming to be signed by Mr. Ross and upon even a cursory looking at the documents, all six signatures are different. One of the documents was even faxed from a fax machine that was shared by two of the other defendants ***. They have accepted these documents without any foundation as to their authenticity, where they came from, who prepared them, without *** following any type of formal protocol, especially relying upon formal documents and forms as they started off with in their brokerage agreements.
>
> At this stage, and pleading stage, I don't think it's the plaintiff's burden to establish all the evidence to establish Mr. Ross's mental condition, his limitations, his disabilities."

¶ 14 Following the hearing, the trial court granted defendants' motion to stay and compel arbitration and entered a written judgment ordering plaintiff to "arbitrate her claims asserted against [defendants] pursuant to the agreement of the parties." In its oral ruling, the trial court stated as follows:

> "THE COURT: I'm going to grant the motion. I don't think it's unconscionable. You know, maybe things will come out at trial. I'm not ruling on anything, but I'm ruling on the motion that's in front of me in response to the reply, and I don't think the mental capacity is established to—in a way that it would invalidate these documents, that the clauses are sufficiently brought to encompass these claims, and I don't think it's unconscionable."

¶ 15 Plaintiff filed a motion to reconsider the trial court's order compelling plaintiff to arbitrate her claims against defendants. The motion to reconsider argued, in part, that newly discovered evidence establishes that more likely than not, Sherwin did not sign the documents defendants relied on for the motion to compel arbitration, and that the trial court misapplied the law in failing to find the arbitration clauses unconscionable given Sherwin's incompetence. Specifically, as to the latter, plaintiff argued Sherwin's "lack of intellectual abilities to understand and comprehend the nature of these arbitration provisions has already been established," and the court should have found the burden was shifted to defendants to prove the transaction was free from influence. The "newly discovered evidence" in support of the former argument was the letters defendants cited in their reply to plaintiff's response to defendants' motion to compel arbitration. Plaintiff asserted the signatures on those letters and the signatures on the documents containing the arbitration clauses are all different. Plaintiff asserted the evidence of the signatures on the letters was newly discovered because the "documents were all in the possession of the Defendants and Plaintiff had no opportunity to address in writing the three documents and the signatures that were attached to the Reply for the first time." Plaintiff wrote that since the hearing on the motion to compel plaintiff had the documents analyzed by a document examiner who opined as follows:

> "Based on the documents provided of the 12/5/1999 Smith Barney client agreement in question marked Exhibit Q5 and copies of the known and authentic signature of Sherwin P. Ross, it is my qualified opinion (due to examining copies and not originals) that the writing pattern of the known, authentic signatures provided is not similar to the writing pattern of the questioned signature Q5 and is more likely than not, written by someone other than Sherwin P. Ross."

Plaintiff argued the authenticity of the signature on the client agreement "has been negated and is void," therefore "the contract is void and the arbitration provision cannot be upheld." Plaintiff also argued that " 'if there is an issue of fact as to the making of the agreement for arbitration, then a trial is necessary.' "

¶ 16 Following a hearing, the trial court denied plaintiff's motion to reconsider, stating as follows: "I'm making no factual findings. Many of the issues that are being raised may be raised in the arbitration. I'm not, you know, certain exactly how that will play out, but I'm just basing it on the—the motion to reconsider standard."

¶ 17 This appeal followed.

¶ 18 ANALYSIS

¶ 19 On appeal plaintiff argues (1) the arbitration clause is unconscionable, (2) Sherwin did not have the mental capacity to enter any agreement, (3) there is a material question of fact as to whether Sherwin actually signed the client agreement, and (4) plaintiff's claims are outside the scope of the arbitration clause. Plaintiff also argues the trial court erred in denying the motion to reconsider because newly discovered evidence establishes that Sherwin did not sign the client agreement.

> "We note at the outset that this is not an appeal from a final order. We have jurisdiction over this interlocutory order, however, under Rule 307 because a motion to compel arbitration is analogous to a motion for injunctive relief. [Citation.] The only question before us on an interlocutory appeal of this type is whether there was a sufficient showing to sustain the order of the trial court granting or denying the relief sought. [Citation.]" *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). Before we reach the substance of plaintiff's arguments, we must address the language requiring the laws of the State of New York to govern the terms and construction of the agreement. The parties' contract states "this Agreement and all the terms herein shall be governed and construed in accordance with the laws of the State of New York." However, a "contract's choice-of-law provision may not apply if the contract's legality is fairly in doubt, for example, if the contract is unconscionable, or if there is some other issue as to the validity of the very formation of the contract." *Life Plans, Inc. v. Security Life of Denver Insurance Co.*, 800 F.3d 343, 357 (7th Cir. 2015). "Applying the choice-of-law clause to resolve the contract formation issue would presume the applicability of a provision before its adoption by the parties has been established. See, *e.g.*, *Trans–Tec Asia v. M/V Harmony Container*, 518 F.3d 1120, 1124 (9th Cir. 2008) ('[W]e cannot rely on the choice of law provision until we have decided, as a matter of law, that such a provision was a valid contractual term and was legitimately incorporated into the parties' contract.'); *B-S Steel of Kansas, Inc. v. Texas Industries*, Inc., 439 F.3d 653, 661 n. 9 (10th Cir. 2006) (referring to 'the logical flaw inherent in applying a contractual choice of law provision before determining whether the underlying contract is valid')." *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 119 (2d Cir. 2012). Absent the choice-of-law provision, "Illinois law is clear *** that the validity, construction and obligations of a contract are governed by the law of the place where it is made." *Progressive Insurance Co. v. Williams*, 379 Ill. App. 3d 541, 546 (2008). Additionally, these "court proceedings are governed in accordance with the Illinois rules of procedure, including the procedures set forth in section 2(a) of the Illinois Uniform Arbitration Act (Uniform Act) (710 ILCS 5/2(a) (West

2010)), because this case was filed in the circuit court of Illinois." *Sturgill v. Santander Consumer USA, Inc.*, 2016 IL App (5th) 140380, ¶ 23.

¶ 20 Defendants' motion to compel arbitration alleged Sherwin executed the 1990 account agreements and the 1999 client agreement, all of the agreements contain an arbitration clause, and plaintiff's claims fall within the scope of the arbitration clause. Plaintiff responded Sherwin did not have the mental capacity to enter the agreements, the arbitration clauses are unconscionable, and the claims in the complaint are outside the scope of the arbitration clause. "A motion to compel arbitration is essentially a section 2-619(a)(9) motion to dismiss or stay an action in the trial court based on an affirmative matter, the exclusive remedy of arbitration." *Sturgill*, 2016 IL App (5th) 140380, ¶ 21. "Section 2-619(a)(9) provides a means to obtain a summary disposition of issues of law or easily proved issues of material fact." *Id.* 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. A section 2-619 motion admits all well-pled facts and the legal sufficiency of the complaint. *Id.* 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.

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

> "[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 (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 clause in the client agreement (or the account agreements) is unconscionable or whether the claims are within the scope of the arbitration clause, 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).

¶ 22 Plaintiff's complaint alleged Sherwin does not possess the mental capacity to enter such agreements. Defendants' motion to compel, which is essentially a motion pursuant to section 2-619(a)(9), did not initially attack that allegation—defendants merely asserted the validity of the agreements and the arbitration clause because they allegedly bore Sherwin's signature. Defendants had the burden to establish their affirmative matter—in this case the existence of a valid agreement and applicable arbitration clause—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). In ruling on defendants' motion the court must construe the pleadings and exhibits strictly against the movant and liberally in favor

of the nonmovant. *Garlick v. Naperville Township*, 2017 IL App (2d) 170025, ¶ 44. "In addition, the court must draw all reasonable inferences from the record in favor of the nonmoving party. [Citation.]" (Internal quotation marks omitted.) *Id.* 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").

¶ 23 In light of plaintiff's unrefuted allegation Sherwin's condition was congenital, and defendants knew about Sherwin's impairments and failed to provide guidance or independent representation for him, defendants' otherwise unsupported allegation Sherwin entered a valid agreement containing an enforceable arbitration clause in their motion to compel failed to satisfy defendants' initial burden. See *Andrews*, 2016 IL App (1st) 122731, ¶ 19. Therefore, plaintiff was not required to come forward with evidence to prove the allegation in her complaint. *Id.* ("Once a defendant has presented adequate *** evidence *** the burden then shifts to the plaintiff who is required to establish that the affirmative matter is either unfounded or involves an issue of material fact"); *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 responded to defendants' motion and argued that Sherwin did not have the mental capacity to enter the agreements, the arbitration clause is unconscionable, and the claims are outside the scope of the arbitration clause—while under no obligation to produce evidence in support of the well-pled claims in her complaint. *Id.* Defendants' reply attempted to refute plaintiff's claim of mental incapacity with documents

Sherwin allegedly wrote and signed himself: one check and three typewritten letters bearing his signature, one of which was notarized. Plaintiff had no opportunity to respond to defendants' evidence presented for the first time in reply to plaintiff's response to the motion to compel; and, regardless, defendants' evidence in *support* of Sherwin's capacity does not entitle them to relief on their motion to compel. "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." *Evergreen Oak Electric Supply & Sales Co. v. First Chicago Bank of Ravenswood*, 276 Ill. App. 3d 317, 319 (1995).

¶ 24 Defendants at best raised a question of fact as to the validity of the agreements and as to whether the arbitration clause is unconscionable (particularly, in light of Sherwin's alleged incapacity). The trial court could not resolve this dispute on the parties' pleadings. The trial court stated that it had "read it all," and would "be happy to hear anything you'd like to add." 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,

> "[u]nder section 2(a) of the Uniform Act, when a party denies the existence of the agreement to arbitrate, the trial court is directed to render a substantive disposition of the issues raised by the motion. [Citations.] A substantive disposition is not one which merely disposes of the motion in a conclusory fashion. [Citation.] A substantive disposition is a more considered disposition in which the trial court separately addresses each issue raised by the

> motion, supporting its resolution of each issue with specific factual findings or legal reasons. [Citation.]
>
> Section 2(a) also 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, ¶¶ 24-25.

¶ 25 The trial court was required to conduct a "summary proceeding" to determine the issues. (Plaintiff did not raise the argument Sherwin did not sign the client agreement until filing her motion to reconsider, a matter we address below.) *Sturgill*, 2016 IL App (5th) 140380, ¶ 25; *Onni v. Apartment Investment & Management Co.*, 344 Ill. App. 3d 1099, 1104 (2003) ("when faced with a motion to compel arbitration, the trial court must separately address each issue raised by the motion, supporting its resolution of each with specific reasons, be they legal points or findings of fact"). 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. *Bensadoun*, 316 F.3d at 175 (citing 9 U.S.C. § 4 ('If the making of the arbitration agreement *** be in issue, the court shall proceed summarily to the trial thereof.')); accord *Sphere Drake Insurance Ltd. v. Clarendon National Insurance Co.*, 263 F.3d 26, 30 (2d Cir. 2001). (Internal quotation marks omitted.)").

> "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. The trial court found the arbitration clause was not unconscionable and that plaintiff failed to establish Sherwin's mental incapacity "in a way that it would invalidate these documents." But the trial court did not state any findings of fact or determinations of law when it made its ruling. The trial court is required to make substantive rulings on the issues raised by a motion to compel arbitration. *Cohen v. Blockbuster Entertainment, Inc.*, 338 Ill. App. 3d 171, 178 (2003). "Where a trial court has failed to articulate any specific reasons for ruling on the motion to compel arbitration, the court has not issued a substantive disposition." *Sturgill*, 2016 IL App (5th) 140380, ¶ 27.

¶ 26 The trial court's oral ruling suggests it was reserving certain determinations for a trial. ("You know, maybe things will come out at trial. I'm not ruling on anything.") The trial court could, and should, conduct an evidentiary hearing to determine those matters denying the existence of an agreement to arbitrate; and the court's factual determination, after a hearing, on Sherwin's mental capacity, may impact its determination of whether the arbitration clause is unconscionable as a matter of law (see generally *Fuqua*, 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.)). On appeal, defendants argue Sherwin's alleged mental incapacity is irrelevant to a finding of unconscionability. We note that 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).

¶ 27 Absent factual and legal determinations by the trial court, "we cannot say that there was a sufficient showing to sustain the trial court's order [granting] the motion to compel arbitration." *Id.* Accordingly, we reverse the trial court's judgment granting defendants' motion to compel arbitration and remand for and 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 *** an to render a disposition with some explanation or substantiation of the facts or rules of law that allow for the order entered"). Whether Sherwin had the mental capacity to enter the agreements, the agreements are procedurally or substantively unconscionable, or the arbitration clause encompasses plaintiff's claims are all matters for a substantive disposition by the trial court. *Id.* ¶ 22 ("the trial court's inquiry is limited to certain gateway matters, such as whether the parties have a valid written agreement to arbitrate at all, and if so, whether the issues in dispute fall within the scope of the arbitration agreement"). On remand, plaintiff should be permitted to amend her response to include the argument Sherwin did not sign the client agreement and both 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.").

¶ 28 CONCLUSION

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

¶ 30 Reversed and remanded.