2019 IL App (1st) 182519-U

FIRST DIVISION
June 24, 2019

No. 1-18-2519

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

MARILYN McCOY-STEWART, as Independent Administrator of the Estate of Rachel L. McCoy, deceased, Plaintiff-Appellee, v. VICTORY CENTRE OF SIERRA RIDGE, LLC, a domestic limited liability company, and PATHWAY SENIOR LIVING, LLC, a domestic limited liability company, Defendants-Appellants.	)	Appeal from the Circuit Court of Cook County No. 17 L 7200 The Honorable James N. O'Hara, Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Justice Griffin concurred in the judgment.
Presiding Justice Mikva specially concurred in the judgment.

ORDER

¶ 1 *Held:* The judgment of the circuit court denying defendants' motion to dismiss and to compel arbitration is reversed. The arbitration provision was neither procedurally nor substantively unconscionable, and was supported by adequate consideration.

¶ 2 Plaintiff Marilyn McCoy-Stewart, as independent administrator of the estate of Rachel L. McCoy, brought negligence claims under the Illinois Survival Act (755 ILCS 5/27-6 (West

2016)) against defendants Victory Centre of Sierra Ridge, LLC (Victory Centre) and Pathway Senior Living, LLC (collectively, defendants), for injuries that Rachel allegedly sustained while residing at Victory Centre of Sierra Ridge, a supportive living facility[1] operated by defendants and owned by Country Club Hills SLF Associates, L.P.[2] Defendants moved to dismiss plaintiff's complaint and to compel arbitration based on an arbitration provision in the lease agreement between Rachel and Country Club Hills SLF Associates. The circuit court denied defendants' motion, finding that the arbitration provision was both substantively and procedurally unconscionable, and that there was no consideration for the arbitration provision. Defendants appeal pursuant to Illinois Supreme Court Rule 307(a) (eff. Nov. 1, 2017). For the reasons that follow, we reverse the judgment of the circuit court and remand with instructions.

¶ 3 I. BACKGROUND

¶ 4 Plaintiff's complaint alleged that in August 2015, Rachel was a resident of Victory Centre of Sierra Ridge, an assisted living community in Country Club Hills, Illinois. Rachel was allegedly injured when an automatic entryway door closed on her and knocked her to the ground. Rachel died in October 2016. Plaintiff's complaint does not assert that Rachel's death was related to the injuries she allegedly sustained in August 2015. Plaintiff asserted survival claims against defendants on theories of common law negligence and *res ipsa loquitur*.

¶ 5 Defendants moved to dismiss plaintiff's complaint pursuant to section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2016)), and to compel arbitration. Attached to defendants' motion was a copy of the February 18, 2013, lease agreement between Rachel and Country Club Hills SLF Associates (lease agreement), which included an addendum containing

[1]Plaintiff does not dispute that Victory Centre is a supportive living facility, and is therefore specifically excluded from the definition of "facility" for the purposes of the Nursing Home Care Act (210 ILCS 45/113(9) (West 2016)).

[2]Country Club Hills SLF Associates, L.P. is not named as a defendant.

an arbitration provision. Rachel's signature appears on both the lease agreement and the arbitration provision. During briefing on defendants' motion, the circuit court permitted plaintiff to depose Shirley Arentz, a former Victory Centre sales manager who executed the lease agreement on behalf of Country Club Hills SLF. Plaintiff's response to the motion to dismiss asserted that the arbitration provision was substantively and procedurally unconscionable, and that the arbitration provision was not supported by adequate consideration.

¶ 6 The circuit court did not conduct an evidentiary hearing. In a written order denying defendants' motion to dismiss and compel arbitration, the circuit court found that the arbitration provision was substantively unconscionable because (1) Rachel agreed to arbitrate any and all claims, while defendants retained the right to pursue any eviction and rent payment claims in court, and (2) Rachel agreed to forfeit her right to seek any attorney fees and costs, which "deprives plaintiff of remedies that the legislature felt were important to the reduction of elder abuse in nursing homes." The circuit court found that "[t]here was no benefit conferred upon [Rachel] in exchange for her executing the Agreement and agreeing to waive her right to court action, potential attorneys' fees, a limitation on damages, or a right to appeal." Finally, the circuit court found that the arbitration provision was procedurally unconscionable because Rachel was 62 years old at the time she executed the lease agreement, "in need of financial assistance to pay for her care, and had no bargaining power with regard to the terms of the Agreement." Although Rachel had been given time to review the lease and arbitration provision, defendants had not explained "the legal effects of signing the Agreement," and "the legal rights that [Rachel] waived were not conspicuously placed on the document so as adequately inform [her] about the Agreement's terms on arbitration upon her executing it." The circuit court therefore denied defendants' motion to dismiss and to compel arbitration.

¶ 7 Defendants filed a timely notice of appeal.

¶ 8 II. ANALYSIS

¶ 9 On appeal, defendants argue that the circuit erred by denying the motion to dismiss and to compel arbitration. Defendants argue that the parties to the lease agreement clearly agreed to arbitrate disputes, that plaintiff's claims are arbitrable under the parties' agreement, and that the arbitration provision is neither substantively or procedurally unconscionable. We agree.

¶ 10 Arbitration agreements are contracts (*Carr v. Gateway*, 241 Ill. 2d 15, 20 (2011)), and are interpreted in the same manner and according to the same rules as are all other contracts (*State Farm Fire & Casualty Co. v. Watts Regulator Co.*, 2016 IL App (2d) 160275, ¶ 27 (citing *J & K Cement Construction, Inc. v. Montalbano Builders, Inc.*, 119 Ill. App. 3d 663, 669 (1983))). The interpretation of a contract is a question of law that we review *de novo*. *Carr*, 241 Ill. 2d at 20. Furthermore, as is the case here, where the circuit court does not hold an evidentiary hearing on a motion to compel arbitration, we review the circuit court's judgment *de novo*. *Falhstrom v. Jones*, 2011 IL App (1st) 103318, ¶ 13.

¶ 11 "The primary objective in construing a contract is to give effect to the intent of the parties." *Gallagher v. Lenart*, 226 Ill. 2d 208, 232 (2007). We do so by looking to the language of the contract, giving each provision its plain and ordinary meaning and viewing the provisions in the context of the whole agreement. *Id.* at 233. Ordinarily, where the parties' arbitration agreement provides that "gateway" questions of arbitrability, enforceability, or unconscionability will be decided by the arbitrator, a court will enforce the arbitration agreement as matter of contract. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 69-70 (2010). However, where a party challenges the enforceability or validity of the arbitration provision itself, a court must address the enforceability of the arbitration provision before enforcing it. *Id.* at 70; see also

Carter v. SSC Odin Operating Co., 2012 IL 113204, ¶ 18 ("[A]n arbitration agreement may be invalidated by a state law contract defense of general applicability, such as fraud, duress, or unconscionability, without contravening section 2 [of the Federal Arbitration Act (FAA) (9 U.S.C. § 1 *et seq.*].).[3]

¶ 12 Here, the arbitration provision provides, in relevant part,

> "The Arbitrator is the sole decision maker and is empowered and shall resolve all disputes including without limitation any disputes as to the making, validity, enforceability, scope, interpretation, voidability, unconscionability, preemption, and/or waiver of this Rider or underlying Service Agreement because the parties intend to resolve all disputes other than payment disputes without involving the court system."

The circuit court, however, retained the authority to make a threshold ruling on whether the arbitration provision itself was enforceable. See *Rent-A-Center*, 561 U.S. at 70. We therefore turn to the issue of whether the circuit court correctly determined that the arbitration provision was unenforceable.

¶ 13 Plaintiff argued, and the circuit court agreed, that the arbitration provision was substantively unconscionable because Rachel agreed to arbitrate any and all claims, while defendants retained the right to pursue any eviction and rent payment claims in court. Furthermore, the circuit court found that Rachel agreed to forfeit her right to seek any attorney fees and costs, which "deprives plaintiff of remedies that the legislature felt were important to

[3]In her appellate brief, plaintiff questions whether the FAA actually applies to the arbitration provision at issue. Plaintiff did not raise this argument in the circuit court in response to defendants' motion to dismiss and to compel arbitration, so we will accept as true that the FAA applies for the purposes of this appeal.

the reduction of elder abuse in nursing homes." We find that plaintiff failed to meet her burden of demonstrating that the arbitration provision was substantively unconscionable.

¶ 14 Our supreme court has adopted the following definition of substantive unconscionability:

> " '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 v. Cingular Wireless LLC*, 223 Ill. 2d 1, 28 (2006) (quoting *Maxwell v. Fidelity Financial Services, Inc.*, 184 Ariz. 82, 89, 907 P.2d 51 (1995)).

¶ 15 Paragraph 41 of the lease agreement provides, in relevant part, "You agree to follow the arbitration process as shown on the Arbitration Addendum executed and attached hereto." Section 1 of the arbitration addendum set forth an arbitration provision:

> "The parties agree that any and all disputes between: a) the Resident or his/her spouse, heirs or assigns; and b) the Community Parties or their affiliates, officers, directors, agents, license holders, managers, or employees, except rent disputes or an action for eviction, shall be decided by arbitration in accordance with this Rider. Therefore, all claims or controversies arising out of or in any way relating to the Residency Agreement, the Resident's stay at the Community, the services rendered for any condition, and any dispute arising out of the diagnosis, treatment, or care of the Resident, including disputes regarding interpretation of this Rider, whether arising out of State or Federal law, whether existing or arising in the future, whether for statutory, compensatory or punitive damages and

> whether sounding in breach if [*sic*] the contract, tort or breach of statutory duties, irrespective of the basis for the duty or the legal theories upon which the claim is asserted, shall be submitted to binding arbitration, as provided below, and shall not be filed in a court of law. THE PARTIES TO THIS RIDER FURTHER UNDERSTAND THAT CLAIMS, INCLUDING MALPRACTICE CLAIMS, CANNOT BE BROUGHT IN A LAWSUIT IN COURT BEFORE A JUDGE OR A JURY *** . This rider shall be governed by and interpreted under the Federal Arbitration Act [9 U.S.C. § 1 *et seq.*]."

¶ 16 Section 1(D) provides that arbitration proceedings would occur in the county in which Victory Centre of Sierra Ridge was located, unless the parties agreed otherwise. Section 1(F) provides that the arbitrator's decision "shall be final and binding without the right to appeal." In Section 1(G), the parties agreed to divide the arbitrator's fees and costs associated with the arbitration equally, and that each party would bear its own costs and attorney fees without the right to recover costs or attorney fees from one another. Section 1(H) provides that all aspects of the arbitration would be confidential, and section 1(I) provides that the arbitration provision and limitation of liability, set forth in section 2, would survive Rachel's death.

¶ 17 Section 2 of the arbitration addendum provides that any claim would be limited to out-of-pocket costs actually incurred, plus an amount not to exceed $250,000 for any and all other damages. The parties were not entitled to recover any punitive damages, and "[i]nterest and/or late fees on unpaid facility charges shall not be awarded." Section 3 of the arbitration addendum provides that if any term or portion of the addendum is found to be unenforceable, the remainder of the addendum will remain effective. Furthermore, section 3 provides "You acknowledge that

You have been encouraged to discuss this Rider with an attorney. By signing below you acknowledge that You have reviewed this Rider and understand it."

¶ 18 We find that the arbitration provision is not "so one-sided as to oppress or unfairly surprise" plaintiff, nor is there "an overall imbalance in the obligations and rights imposed." Both parties agreed that all claims against one another would be subject to arbitration, "except rent disputes or an action for eviction." While plaintiff argues that Rachel was "forced" to waive the right to be heard by a judge or jury, to keep any documents, findings, and awards confidential, and have her non-out-of-pocket damages capped at $250,000, it is inescapable that those provisions were mutually binding on both parties to the lease agreement. Plaintiff does not identify any authority to suggest that mutually binding provisions in an arbitration provision should be construed as affecting only one party; substantive unconscionability requires a showing that the provision itself is so one-sided that it is oppressive to the party challenging the provision. Both parties waived the right to a judge or jury and agreed to the provisions for confidentiality and limits of liability. And, contrary to plaintiff's argument, both Rachel and defendants could pursue a claim in court for rent disputes, not just defendants. The only action that defendants could bring in court that Rachel could not was an action for eviction, which Rachel—as the lessee—could not bring anyway. There is nothing about the arbitration provision that would lead us to conclude that it is one-sided, oppressive, or imbalanced in favor of defendants and against plaintiff.

¶ 19 The circuit court also found that by agreeing to forfeit her right to seek any attorney fees and costs, Rachel was deprived "of remedies that the legislature felt were important to the reduction of elder abuse in nursing homes." But plaintiff concedes that Victory Centre of Sierra Ridge is not a nursing home as defined by Illinois law, and it is undisputed that Victory Centre of

Sierra Ridge does not provide comprehensive nursing or medical care to its residents. There is nothing in the record to suggest that prior to her death, Rachel would have been capable of pursuing any claims against Victory Centre of Sierra Ridge under the Nursing Home Care Act (210 ILCS 45/1-101 *et seq.* (West 2016)), which expressly provides a statutory right to recover costs and attorney fees (*id.* § 3-602), or under any other statutory cause of action that provides for costs and attorney fees. And while the circuit court found that public policy considerations favored a finding of substantive unconscionability, plaintiff does not advance any public policy arguments in favor of affirming the circuit court's judgment. We therefore cannot say that the arbitration provision's bar on the recovery of costs or attorney fees violates any public policy. In sum, the circuit court erred by concluding that the arbitration provision was substantively unconscionable and that the substantive unconscionability rendered the arbitration provision unenforceable.

¶ 20 We next consider whether the arbitration provision was procedurally unconscionable. Plaintiff argued, and the circuit court agreed, that the arbitration provision was unenforceable because Rachel was 62 years old, in need of financial assistance, and had no bargaining power over the terms of the arbitration provision. Despite having had the opportunity to review the arbitration provision, plaintiff argued that defendants did not explain the legal effect of the provision to Rachel. She further argued that the rights Rachel was waiving were not conspicuously placed in the agreement. We find that the arbitration provision is not procedurally unconscionable.

¶ 21 Our supreme court has adopted the following definition of procedural unconscionability:

> " 'Procedural unconscionability consists of some impropriety during the process of forming the contract depriving a party of a 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.' " *Kinkel*, 223 Ill. 2d at 23 (quoting *Frank's Maintenance v. C.A. Roberts Co.*, 86 Ill. App. 3d 980, 989-90 (1980)).

Provisions limiting liability must either be bargained for, be brought to the other party's attention, or be conspicuous. *Id.*

¶ 22 The only evidence relied on by plaintiff to support her claim of procedural unconscionability was the arbitration provision itself and the deposition transcript of Shirley Arentz, a former Victory Centre sales manager who executed the lease agreement on behalf of Country Club Hills SLF. Arentz had no specific recollection of Rachel. Arentz testified that a prospective resident would be presented with a lease agreement. They would have an opportunity to review the agreement, and could send it to family members or an attorney. Arentz did not know whether Rachel had anyone else review the lease. Arentz did not read through the lease agreement with prospective residents. Prospective residents were provided a room to review the lease agreement, and they could ask questions if they did not understand something. Executing the lease agreement was a condition of residency.

¶ 23 There is nothing in the record to suggest that Rachel, at the time she executed the lease agreement, did not read the lease agreement and arbitration addendum or understand what she was reading. Nor does plaintiff identify any facts to suggest that Rachel was not given an

opportunity to review the lease agreement or arbitration addendum prior to signing the documents before moving in to Victory Centre. There is nothing to suggest that Rachel had any physical or mental impairments that might have affected her ability to read or understand the documents. By signing the arbitration provision, Rachel expressly warranted that she had been encouraged to discuss the addendum with an attorney and that she had reviewed and understood its terms. Plaintiff does not identify any pressure placed on Rachel to sign the lease agreement or arbitration addendum. While plaintiff argues that Rachel was in need of financial assistance, there is absolutely no evidence in the record to support this argument. Nor is there any evidence in the record that Rachel had no choice but to sign a lease with defendants; the record is silent as to whether Rachel could have obtained the same or similar services from a different provider. Simply put, there is no evidence about the circumstances of the transaction from which to infer that Rachel did not understand the agreement, was pressured into signing the agreement, or was unable to question or negotiate the agreement that would support a finding of unconscionability.

¶ 24 Plaintiff argues that "each of the basic rights the resident waives is scattered through the lease and arbitration agreement." A plain reading of these documents does not support this conclusion. The arbitration addendum is a total of five pages long, two pages of which are reserved for signature blocks. The substance of the addendum is divided in to three clearly delineated sections: an arbitration provision, a limitation of liability provision, and a severability provision. We find that there is nothing inconspicuous about the arbitration provision, particularly where it is contained in a document clearly labeled "Arbitration Addendum." The arbitration provision, which starts on the first page of the addendum states, in all capital letters, "THE PARTIES TO THIS RIDER FURTHER UNDERSTAND THAT CLAIMS, INCLUDING MALPRACTICE CLAIMS, CANNOT BE BROUGHT IN A LAWSUIT IN COURT BEFORE

A JUDGE OR A JURY[.]" The evidence in the record demonstrates that Rachel was provided an opportunity to review the documents and was free to ask any questions or have someone else review the terms of the lease and arbitration addendum. The arbitration provision was not buried in a maze of impenetrable fine print, but instead was conspicuous and prominently featured on the document. The circuit court erred by finding that the arbitration provision was unenforceable due to procedural unconscionability.

¶ 25 Finally, plaintiff argues, and the circuit court agreed, that that the arbitration provision is unenforceable because there was no consideration provided in exchange for the arbitration provision. We disagree.

¶ 26 " 'Consideration' is the 'bargained-for exchange of promises or performances, and may consist of a promise, an act or a forbearance.' " *Carter*, 2012 IL 113204, ¶ 23 (quoting *McInerney v. Charter Golf, Inc.*, 176 Ill. 2d 482, 487 (1997)). " 'Any act or promise which is of benefit to one party or disadvantage to the other is a sufficient consideration to support a contract.' " *Id.* (quoting *Steinberg v. Chicago Medical School*, 69 Ill. 2d 320, 330 (1977)). The values exchanged do not need to be equivalent. *Id.* ¶ 24.

¶ 27 Here, virtually all of the arbitration provisions were mutual. The parties mutually agreed to arbitrate any and all disputes, except rent disputes or an action for eviction. The parties mutually agreed to divide the arbitrator's fees and costs associated with the arbitration equally, and that each party would bear its own costs and attorney fees without the right to recover costs or attorney fees from one another. The parties mutually agreed to cap non-out-of-pocket damages at $250,000 and to waive any right to punitive damages or to recoup costs and attorney fees. There is nothing one-sided about the arbitration provision, and we conclude that it was supported by adequate consideration.

¶ 28 III. CONCLUSION

¶ 29 In sum, the arbitration provision is enforceable because it is neither substantively nor procedurally unconscionable, and is supported by adequate consideration. The circuit court erred by denying defendants' motion to dismiss plaintiff's complaint and to compel arbitration. We reverse the circuit court's judgment and remand with instructions that the circuit court grant defendants' motion to dismiss and compel arbitration.

¶ 30 Reversed and remanded with instructions.

¶ 31 PRESIDING JUSTICE MIKVA, specially concurring:

¶ 32 I join the court's opinion but write separately to note that, if not constrained by the narrow view taken by numerous decisions regarding what is required to find an arbitration agreement unconscionably one-sided or lacking in consideration, I would agree with the trial court that the arbitration addendum Ms. McCoy signed was substantively unconscionable.

¶ 33 The standard imposed by our supreme court—and correctly cited by the trial court in this case—limits "substantive unconscionability" in this context to "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 v. Cingular Wireless LLC* 223 Ill. 2d 1, 28 (2006). There is almost no Illinois case law in which appellate courts have found arbitration agreements unconscionable under this standard.

¶ 34 Ms. McCoy incorrectly equates this case with *Vassilkovska v. Woodfield Nissan, Inc*., 358 Ill. App. 3d 20 (2005), in which a car dealership defendant drafted an arbitration agreement that "completely" exempted it from having to arbitrate any of the six specific claims that it could possibly have brought against the plaintiff car buyer. 358 Ill. App. 3d at 29. Here, Victory Centre expressly exempted itself from having to arbitrate the two types claims it was most likely to

bring against Ms. McCoy—claims for unpaid rent or eviction. But it did not "completely" exempt itself from arbitration. Under the addendum the parties signed, there are other hypothetical claims that Victory Centre would arguably be bound to arbitrate, such as claims for damage to its property. Absent an arbitration agreement as extreme as *Vassilkovska*, there is simply no Illinois precedent for Ms. McCoy to rely on when she asks us to invalidate this arbitration addendum.

¶ 35 I also note that while the trial court incorrectly assumed that the Nursing Home Care Act (210 ILCS 45/1 *et seq*. (West 2016)) applied, there are other statutory claims that award costs and attorney fees to a successful plaintiff, under which Ms. McCoy might have brought a claim were it not for the arbitration addendum. See, *e.g.*, 42 USCA § 1988(b) (proceedings in vindication of civil rights); 775 ILCS 5/8B-104 (West 2016) (relief; penalties under the Illinois Human Rights Act). The arbitration addendum eliminates not only the ability to recoup fees and costs in connection with such claims but any possibility of an award of punitive damages. These restrictions, along with a cap on damages of $250, 000, and an obligation to pay for half of the cost of an arbitrator are all, in theory, "mutual" obligations and limitations. In reality, however, they are designed to limit the rights of residents like Ms. McCoy and preserve the assets of Victory Centre.