2011 IL App (1st) 103384-U

Third Division
September 28, 2011

No. 1-10-3384

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ACE METAL CRAFTS COMPANY, an Illinois Corporation, and KEVIN BAILEY,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellants,	)	
v.	)	10 CH 14858
DOMESTIC LINEN SUPPLY CO., INC., an Illinois Corporation d/b/a DOMESTIC UNIFORM RENTAL,	)	Honorable Mary Anne Mason,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Steele and Justice Salone concurred in the judgment.

ORDER

Held: The trial court may properly dismiss a complaint for a judgment declaring an arbitration clause void, if the complaint fails to include allegations which could support a finding that the clause is either substantively or procedurally unconscionable.

¶ 1 Ace Metal Crafts Company and Domestic Linen Supply Company signed a contract with an arbitration clause and a liquidated damages provision. When Ace cancelled the contract, Ace refused to pay the amount Domestic claimed as liquidated damages. Domestic

filed for arbitration and Ace filed this lawsuit, seeking a judgment declaring the arbitration clause in the contract unconscionable and unenforceable. The trial court dismissed the complaint for failure to state a claim for relief. On appeal, we hold that Ace has not pled facts which could support a finding that the arbitration clause is unconscionable. Therefore, we affirm the decision to dismiss Ace's complaint.

¶ 2 BACKGROUND

¶ 3 On October 29, 1998, Ace, through its agent, Kevin Bailey, signed a contract in which Domestic agreed to supply uniforms for Ace's workers for a period of three years in exchange for weekly payments of more than $250. The contract provided for automatic renewal for successive five year terms, starting at the end of the initial three year period, unless either party provided notice of termination at least six months before the expiration of the term. Even if one party notified the other of termination, the contract would "continue in force on a month-to-month basis until terminated."

¶ 4 Bailey signed the contract under a line that said, in bold print, "The Customer also warrants that he has read the entire contract, front and back, and has received a copy of this agreement." The back of the contract included a clause which provided:

> "In the event of any controversy or claim in excess of $5,000.00 arising out of or relating to this agreement, *** the question, controversy or dispute shall be submitted to and settled by arbitration ***. The filing party may use either court or arbitration where the claim is less than $5,000.00."

The contract also required Ace to pay "fifty percent (50%) of the gross anticipated receipts hereunder for the unexpired term of this agreement, or any extension thereof," if Ace breached the agreement.

¶ 5 In 2006, Ace decided to terminate the contract. Ace sent Domestic a letter informing Domestic that it should no longer provide uniforms to Ace after January 1, 2007. Domestic responded that the term of the contract would not expire for several years, so Ace had sent the notice prematurely. But Domestic stopped supplying uniforms to Ace at the end of 2006.

¶ 6 On September 27, 2007, Domestic's attorneys sent Ace a letter in which it requested a payment of more than $85,000. The attorneys justified most of the request as liquidated damages for early termination of the agreement. Ace did not pay the bill. On February 24, 2010, Domestic filed a demand for arbitration of the dispute. Ace responded, in April 2010, by filing this lawsuit, in which Ace sought a judgment declaring the arbitration clause unconscionable and unenforceable. Ace alleged in its complaint that Domestic presented to Bailey a preprinted contract form, and the back of the form included the arbitration clause, "written in tiny print which appears to be 8-point font." Domestic did not highlight, underline, or otherwise distinguish the arbitration clause from the remainder of the text. In the complaint, Ace also pointed to the automatic renewal provision and the liquidated damages clause as evidence of unconscionability.

¶ 7 Domestic moved to dismiss the complaint, under section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2008)), arguing that Ace had not alleged facts that would justify the entry of a judgment declaring the arbitration clause unenforceable. On

August 20, 2010, the trial court granted the motion to dismiss the complaint with prejudice, because the court found the arbitration clause enforceable. Although Ace moved for reconsideration of the judgment, it did not seek leave to amend its complaint. The trial court denied the motion for reconsideration. Ace now appeals.

¶ 8 ANALYSIS

¶ 9 Domestic did not file an appellee's brief. Because we find the issues sufficiently straightforward, we will address the appeal based solely on the arguments in Ace's brief. See *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 10 The court should not dismiss a complaint for failure to state a claim for relief unless the pleadings show that the plaintiff cannot prove any set of facts entitling it to relief. *Flex-O-Glass, Inc. v. City of Dixon*, 307 Ill. App. 3d 945, 948-49 (1999). We review a trial court's order granting a section 2-615 motion to dismiss *de novo*. *Washington v. Waller*, 391 Ill. App. 3d 459, 463 (2009).

¶ 11 A court may base a finding of unconscionability on either procedural or substantive unconscionability, or a combination of both. *Kinkel v. Cingular Wireless LLC*, 223 Ill. 2d 1, 21 (2006), citing *Razor v. Hyundai Motor America*, 222 Ill. 2d 75, 99 (2006). "Procedural unconscionability refers to a situation where a term is so difficult to find, read, or understand that the plaintiff cannot fairly be said to have been aware he was agreeing to it, and also takes into account a lack of bargaining power. [Citation.] Substantive unconscionability refers to those terms which are inordinately one-sided in one party's favor." *Razor*, 222 Ill. 2d at 100.

¶ 12 Here, Ace argues both procedural and substantive unconscionability. Substantively, Ace maintains that the clause unconscionably requires arbitration of all claims in excess of $5,000. Procedurally, Ace claims that the court should not enforce the arbitration clause because Domestic made it obscure, printing it on the back of the contract in small print without any emphasis.

¶ 13 For its substantive claim, Ace relies on *Kinkel v. Cingular Wireless LLC*, 223 Ill. 2d 1 (2006). In *Kinkel*, Cingular included an arbitration clause in its customer agreement. The customer in *Kinkel* sought to challenge a $150 cancellation fee Cingular had charged her. Our supreme court found the arbitration filing fee of up to $125 disproportionate to the damage claim, especially because the customer would need legal help to pursue her claim. The court held, "the cost of vindicating the claim is so high that the plaintiff's only reasonable, cost-effective means of obtaining a complete remedy is as either the representative or a member of a class." *Kinkel*, 223 Ill. 2d at 42. Because the arbitration clause deprived the customer of class action remedies, while leaving Cingular all the remedies it would ever want, the court found the clause substantively unconscionable. *Kinkel*, 223 Ill. 2d at 42.

¶ 14 Here, Ace contests the enforceability of the automatic renewal and the liquidated damages provisions in the contract. Domestic seeks to charge Ace $85,000, in addition to the sums Ace already paid weekly, as a penalty for early cancellation of a three-year contract after eight years. The amount at issue greatly exceeds the arbitration filing fee, and arbitration should enable Ace to present its arguments and vindicate its rights, without resort

to a class action or to other relief available only in court. *Kinkel* does not warrant a finding that the arbitration clause in the contract between Ace and Domestic is substantively unconscionable.

¶ 15 Courts will find contract terms substantively unconscionable when they are "so one-sided as to oppress or unfairly surprise an innocent party, [or if they create] an overall imbalance in the obligations and rights imposed by the bargain, and significant cost-price disparity. *Kinkel*, 223 Ill. 2d at 28. "Courts are generally reluctant to use the unconscionability doctrine to rewrite the terms of contracts into which educated businessmen have entered." *Dillman & Associates, Inc. v. Capitol Leasing Co.*, 110 Ill. App. 3d 335, 341 (1982). Given the facts in this case, where the parties need to resolve issues concerning the enforceability of contractual provisions for automatic renewal and liquidated damages, we see no reason to consider arbitration an inadequate forum for the litigation. See *Tortoriello v. Gerald Nissan of North Aurora, Inc.*, 379 Ill. App. 3d 214, 238-39 (2008). The arbitration clause, applied in the circumstances of this case, is not substantively unconscionable.

¶ 16 We agree with Ace that the contract shows some level of procedural unfairness. Domestic should have made the arbitration clause more prominent, by highlighting it, printing it in bold type or in capital letters, or by discussing it with each customer. However, Bailey, on behalf of Ace, signed the contract beneath a line which says, in bold print, "The Customer also warrants that he has read the entire contract, front and back." In light of Illinois' courts general disposition not to disturb contracts entered into between businesses (*Capitol Leasing Co.*, 110 Ill. App. 3d at 341), and to favor enforcement of arbitration

clauses (see *Salsitz v. Kreiss*, 198 Ill. 2d 1, 13 (2001)), we find that Ace has not alleged facts that would warrant a judgment declaring the arbitration clause unenforceable. The arbitrator should address Ace's arguments concerning the enforceability of other contract clauses. See *Bishop v. We Care Hair Development Corp.*, 316 Ill. App. 3d 1182, 1199 (2000).

¶ 17 Finally, Ace argues that the case law does not require it to show the unconscionability of the arbitration clause for its complaint to survive a section 2-615 motion to dismiss. In *Beahringer v. Page*, 204 Ill. 2d 363, 372 (2003), our supreme court held that a plaintiff seeking a declaratory judgment must plead (i) it has a "legal tangible interest;" (ii) the defendant has an opposing interest; and (iii) the parties have an actual controversy about their opposing interests. We find that in the absence of factual allegations that could support a finding that the court should not enforce the arbitration clause in the parties' contract due to unconscionability, Ace has failed to show a "legal tangible interest" in obtaining a judgment declaring the arbitration clause void. *Beahringer*, 204 Ill. 2d at 372.

¶ 18 CONCLUSION

¶ 19 The contract clause requiring arbitration of all disputes involving claims in excess of $5,000 does not impose a substantively unconscionable burden on Ace's rights. In addition, in this contract between businesses where a representative of Ace signed the contract beneath a line which says, in bold print, "The Customer also warrants that he has read the entire contract, front and back," Ace has not pled facts which could support a finding of procedural unconscionability. Because Ace failed to plead facts that could support a judgment finding the arbitration clause unconscionable, we affirm the decision to

dismiss the complaint.

¶ 20 Affirmed.