[Cite as *Brownell v. Van Wyk*, 2010-Ohio-6338.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

JOYCE BROWNELL	:	
Plaintiff-Appellee	:	C.A. CASE NO. 24042
v.	:	T.C. NO. 10CV1065
GREG VAN WYK, et al.	:	(Civil appeal from Common Pleas Court)
Defendants-Appellants	:	
	:	

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O P I N I O N

Rendered on the 23rd day of December, 2010.

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on the Notice of Appeal of Greg Van Wyck and Bright Ideas Additions, Inc. ("Appellants"), filed May 14, 2010. On February 5, 2010, Joyce Brownell filed a "Complaint for Breach of Contract, Negligence & Fraud" against

Appellants. Attached to the Complaint is a "Contract," signed by Van Wyck, as "design consultant," and Brownell. The contract provides in part, "We are **Sunroom Specialists** and only supply and build sunroom additions." (Emphasis in original). The contract further provides that the total cost of Brownell's sunroom addition is $89,874.00. The contract also delineates additional and extensive remodeling of Brownell's kitchen, entry closet, exterior of the home, the creation of a "new master suite," removal and replacement of flooring in the entry, kitchen, dining and living rooms, front bedroom, hall bath and master suite, and plumbing and electrical work, for an additional cost of $287,133.00. The contract contains an arbitration clause that provides:

{¶ 2} "**Governing Law**

{¶ 3} "This contract shall be governed by the laws of the State of Ohio, and any dispute arising hereunder shall be resolved exclusively before a single arbitrator and in accordance with the Commercial Arbitration Rules of the American Arbitration Association."

{¶ 4} On March 8, 2010, Appellants filed a "Motion to Dismiss or Stay Pending Arbitration." According to the motion, "because the parties have contractually agreed to submit this matter to Arbitration, Plaintiff can prove no set of facts that would entitle her to relief from this Court," and also that Appellants are entitled to a stay of the action pursuant to R.C. 2711.02. Brownell opposed the motion to dismiss or stay, arguing in part that the "Complaint contains allegations of unenforceability of the contract, and fraud in the inducement of its execution. The Complaint contains the allegation that the contract was unconscionable. One ground for challenging the arbitration provision in the contract is

unconscionability."

{¶ 5} On March 19, 2010, the trial court overruled Van Wyck's motion. The court's decision provides as follows:

{¶ 6} "I. FACTS

{¶ 7} "Defendant argues that this matter should be submitted to arbitration because the parties expressly agreed to resolve all disputes before a single arbitrator in accordance with the Commercial Arbitration Rules of the American Arbitration Association. Plaintiff contends that the arbitration provision is boilerplate language limited to disputes concerning the sunroom addition, rather than the additional remodeling and reconstruction efforts.

{¶ 8} "II. LAW & ANALYSIS

{¶ 9} "A motion for failure to state a claim upon which relief can be granted pursuant to Civ.R.12(B)(6) is procedural and tests the sufficiency of the complaint. (Citation omitted). All factual allegations of the complaint must be presumed to be true and all reasonable inferences must be made in favor of the nonmoving party. (Citation omitted).

* * *

{¶ 10} "Plaintiff alleges she paid Defendants $480,000 to remodel her $600,000 house, which amount far exceeded the original approximately $90,000 contract for a sunroom, that the repairs were not made in a workmanlike manner, and the Defendants abandoned the work they started. Plaintiff brings claims for breach of contract, negligence and fraud, and generally alleges that the agreement between the parties was unconscionable.

{¶ 11} "Presuming the factual allegations as true, the Court finds that the contract was unconscionable and therefore unenforceable, including the arbitration clause therein.

This finding is made for purposes of this decision only, upon review of Defendant's motion to dismiss, and the Court reserves ruling on enforceability of the contract as this litigation continues.

{¶ 12} "III. CONCLUSION

{¶ 13} "Defendant's motion to dismiss or to stay pending arbitration is overruled. * * * ."

{¶ 14} Appellants' sole assignment of error is as follows:

{¶ 15} "THE TRIAL COURT ERRED IN FAILING TO GIVE EFFECT TO THE ARBITRATION PROVISION CONTAINED IN THE PARTIES' CONTRACT."

{¶ 16} R.C. 2711.01(A) provides, "A provision in any written contract * * * to settle by arbitration a controversy that subsequently arose out of the contract, or out of the refusal to perform the whole or any part of the contract, or any agreement in writing between two or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit, or arising after the agreement to submit, * * * shall be valid, irrevocable, and enforceable, except upon grounds that exist at law or in equity for the revocation of any contract."

{¶ 17} "Ohio courts recognize a 'presumption favoring arbitration' that arises 'when the claim in dispute falls within the scope of the arbitration provision.'" *Taylor Building Corp. of America v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, ¶ 27 (citations omitted). "Ohio law directs trial courts to grant a stay of litigation in favor of arbitration pursuant to a written arbitration agreement on application of one of the parties, in accordance with R.C. 2711.02(B)." Id., ¶ 28.

{¶ 18} R.C. 2711.02(B) provides: "If any action is brought upon any issue referable to arbitration under an agreement in writing for arbitration, the court in which the action is pending, upon being satisfied that the issue involved in the action is referable to arbitration under an agreement in writing for arbitration, shall on application of one of the parties stay the trial of the action until the arbitration of the issue has been had in accordance with the agreement, provided the applicant for the stay is not in default in proceeding with arbitration."

{¶ 19} "Ohio law authorizes appellate review of such orders." *Benfield*, ¶ 30. R.C. 2711.02(C) provides: "* * * an order under division (B) of this section that grants or denies a stay of the trial of any action pending arbitration * * * is a final order and may be reviewed, affirmed, modified, or reversed on appeal pursuant to the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505. of the Revised Code."

{¶ 20} As noted above, arbitration agreements are enforceable "except upon grounds that exist at law or in equity for the revocation of any contract." R.C. 2711.01(A). "Unconscionability is a ground for revocation of a contract." *Benfield*, ¶ 33 (citation omitted).

{¶ 21} "Unconscionability includes both 'an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.' (Citations omitted). The party asserting unconscionability of a contract bears the burden of proving that the agreement is both procedurally and substantively unconscionable." (Citations omitted). Id., ¶ 34.

{¶ 22} "A determination of whether a written contract is unconscionable is an issue of law. (Citations omitted). Courts review questions of law de novo." (Citations omitted). Id., ¶ 35.

{¶ 23} "When a trial court makes factual findings, however, supporting its determination that a contract is or is not unconscionable, such as any findings regarding the circumstances surrounding the making of the contract, those factual findings should be reviewed with great deference." Id., ¶ 38.

{¶ 24} "R.C. 2711.01 * * * 'acknowledges that an arbitration clause is, in effect, a contract within a contract, subject to revocation on its own merits.'" Id., ¶ 41, quoting *ABM Farms, Inc. v. Woods*, 81 Ohio St.3d 498, 501-502, 1998-Ohio-612. " * * * 'Because the arbitration clause is a separate entity, it only follows that an alleged failure of the contract in which it is contained does not affect the provision itself.' Id.[,] at 502 * * * . Thus, in *ABM Farms*, [the Ohio Supreme Court] held that to defeat a motion under R.C. 2711.02 for a stay of litigation in favor of arbitration, 'a party must demonstrate that the arbitration provision itself in the contract at issue, and not merely the contract in general, was fraudulently induced.' Id., citing *Krafcic v. USA Energy Consultants, Inc.* (1995), 107 Ohio App.3d 59 * * *.

{¶ 25} "Similarly, when a party challenges an arbitration provision as unconscionable pursuant to R.C. 2711.01(A), the party must show that the arbitration clause itself is unconscionable. If the court determines that the arbitration clause is enforceable, claims of unconscionability that relate to the contract generally, rather than the arbitration clause specifically, are properly left to the arbitrator in the first instance." *Benfield*, ¶

41-42.

{¶ 26} "'Unconscionability includes both "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."' (citations omitted). The party asserting unconscionability of a contract bears the burden of proving that the agreement is both procedurally and substantively unconscionable." (Citations omitted). *Hayes v. Oakridge Home*, 122 Ohio St.3d 63, 2009-Ohio-2054, ¶ 20.

{¶ 27} "In determining whether an arbitration agreement is procedurally unconscionable, courts consider 'the circumstances surrounding the contracting parties' bargaining, such as the parties' "age, education, intelligence, business acumen and experience, * * * who drafted the contract, * * * whether alterations in the printed terms were possible, [and] whether there were alternative sources of supply for the goods in question."' (citations omitted).

{¶ 28} "Additional factors that may contribute to a finding of procedural unconscionability include the following: 'belief by the stronger party that there is no reasonable probability that the weaker party will fully perform the contract; knowledge of the stronger party that the weaker party will be unable to receive substantial benefits from the contract; knowledge of the stronger party that the weaker party is unable to reasonably protect his interests by reason of physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement, or similar factors.'" Id., ¶ 23-24.

{¶ 29} "An assessment of whether a contract is substantively unconscionable involves consideration of the terms of the agreement and whether they are commercially

reasonable. (Citations omitted). Factors courts have considered in evaluating whether a contract is substantively unconscionable include the fairness of the terms, the charge for service rendered, the standard in the industry, and the ability to accurately predict the extent of future liability. (Citations omitted). No bright-line set of factors for determining substantive unconscionability has been adopted * * * . The factors to be considered vary with the content of the agreement at issue." Id., ¶ 33.

{¶ 30} We note that in his Reply brief, Van Wyck asserts, "without a hearing or introducing any factual testimony the Appellee clearly could not have carried their [sic] burden to demonstrate procedural unconscionability." R.C. 2711.02 does not require the trial court to conduct a hearing on the enforceability of an arbitration provision (unlike R.C. 2711.03, pursuant to which a party may move the court to compel arbitration, which provides in part, " * * * the court shall hear the parties.") In *Olah v. Ganley Chevrolet, Inc.* (Cuhahoga App. No. 86132), 2006-Ohio-694, the Eighth District determined, in the context of a motion to stay under R.C. 2711.02, that "when the circumstances of the sale are not developed sufficiently in the record to ascertain unconscionability, the trial court should conduct a hearing to decide the issue." ¶ 29. Also, in *Reynolds v. Crockett Homes, Inc.* (Columbiana App. No. 08 CO 8), 2009-Ohio-1020, the Seventh District determined that it did not have enough evidence before it to ascertain whether the arbitration provision therein between a home purchaser and home builder was unconscionable, in the context of a motion to stay under R.C. 2711.02, and it remanded the matter. The trial court had found the provision to be "'ambiguous and therefore confusing,'" and the Seventh District, assuming that the provision was set aside due to unconscionability, noted that there was no

evidence indicating "the age, education, intelligence, business acumen and experience or relative bargaining power of the parties; whether the terms were explained to the Reynolds; whether the parties could have altered the printed terms; whether there was an alternative source of the goods which the Reynolds were purchasing; or who drafted the agreement. Further, there is no evidence demonstrating whether the terms of the agreement are commercially reasonable. Moreover, the arbitration provision at issue is part of a larger warranty agreement, the entirety of which has not been included in the records." Id., ¶ 3.

{¶ 31} Here the trial court made no factual findings supporting its determination that the arbitration provision is unconscionable, and the circumstances surrounding the arbitration agreement have not been sufficiently developed in the record for us to ascertain unconscionability. Accordingly, the judgment of the trial court is reversed, and the matter is remanded for purposes of an evidentiary hearing on the issue of whether the arbitration provision is unconscionable and thus unenforceable.

{¶ 32} Judgment reversed and remanded for proceedings consistent with this opinion.

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FAIN, J. and GRADY, J., concur.

Copies mailed to:

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