[Cite as *Mattox v. Dillard's, Inc.*, 2008-Ohio-6488.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90991

CASSANDRA MATTOX

PLAINTIFF-APPELLANT

vs.

DILLARD'S, INC., ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-628906

BEFORE: Calabrese, J., Cooney, P.J., and Boyle, J.

RELEASED: December 11, 2008

JOURNALIZED:

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ANTHONY O. CALABRESE, JR., J.:

{¶ 1} Plaintiff-appellant, Cassandra Mattox ("appellant"), appeals the decision of the lower court granting a motion to compel arbitration. Having reviewed the arguments of the parties and the pertinent law, we hereby affirm the lower court.

I

{¶ 2} Appellant is a former employee of Dillard's, Inc. She filed the underlying action against defendants-appellees, Dillard's, Inc. and Regina Ritz (collectively "Dillard's") in July 2007. Appellant alleged two claims arising out of Dillard's terminating her employment in July 2003: (1) wrongful discharge in violation of public policy, and (2) race discrimination. In lieu of filing an answer, Dillard's moved to stay the proceedings and to compel arbitration under an arbitration agreement that appellant signed in the course of her employment.

{¶ 3} Appellant opposed the motion and sought a declaration that the arbitration agreement was unconscionable. In December 2007, appellant attempted to seek discovery from Dillard's, to which Dillard's responded with a motion for a protective order, requesting that the court deny discovery while its motion to stay the proceedings and compel arbitration was pending. The trial court subsequently granted Dillard's motion to compel arbitration and dismissed appellant's claims. The trial court denied all other pending motions as moot.

II

{¶ 4} Appellant's first assignment of error provides the following: "The trial court erred to the prejudice of plaintiff-appellant by holding that the arbitration agreement entered into by plaintiff-appellant and defendant-appellee, Dillard's Inc.,

was not unconscionable as a matter of law and by subsequently dismissing plaintiff-appellant's case with prejudice and compelling it to arbitration pursuant to said arbitration agreement."

{¶ 5} Appellant's second assignment of error provides the following: "The trial court erred to the prejudice of plaintiff-appellant as a matter of law by failing to hold an evidentiary hearing as required by R.C. 2711.03 before issuing the order that both dismissed with prejudice and compelled to arbitration plaintiff-appellant's case against defendants-appellees."

III

{¶ 6} Whether an arbitration clause is unconscionable is a question of law. *Insurance Co. of North Am. v. Automatic Sprinkler Corp.* (1981), 67 Ohio St.2d 91, 98. In reviewing a trial court's decision granting a motion to compel arbitration, where it is alleged that the arbitration agreement is unconscionable, this court must apply a de novo standard of review, but "any factual findings of the trial court must be accorded appropriate deference." *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, ¶2.

{¶ 7} Ohio and federal courts encourage arbitration to settle disputes. *ABM Farms Inc. v. Woods*, 81 Ohio St.3d 498, 500, 1998-Ohio-612. Arbitration agreements are valid and enforceable and should be upheld just as any other contract. *Vanyo v. Clear Channel Worldwide*, 156 Ohio App.3d 706, 2004-Ohio-1793, ¶8. Like other contracts, however, an arbitration agreement is not enforceable if it is found to be unconscionable. *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 471, 1998-Ohio-294.

{¶ 8} "Unconscionability is generally recognized to include an absence of meaningful choice on the part of one of the parties to a contract, combined with contract terms that are unreasonably favorable to the other party." *Collins v. Click Camera & Video, Inc.* (1993), 86 Ohio App.3d 826, 834; see, also, *Lake Ridge Academy v. Carney* (1993), 66 Ohio St.3d 376, 383. Unconscionability embodies two separate concepts: (1) substantive unconscionability and (2) procedural unconscionability. *Collins,* supra, at 834. Before a court can find that an arbitration agreement is unconscionable and therefore unenforceable, the party seeking to invalidate it must allege and prove a "quantum" of both prongs. Id.

{¶ 9} Appellant argues in her first assignment of error that the lower court erred by holding that the arbitration agreement was not unconscionable and by subsequently dismissing plaintiff-appellant's case with prejudice and compelling arbitration pursuant to said arbitration agreement. We do not find merit in appellant's argument.

{¶ 10} A review of the record demonstrates that Dillard's and its former employee, the appellant, entered into an agreement on July 17, 2001, to arbitrate certain claims. The claims appellant raised in the complaint were covered by this arbitration agreement. The lower court properly enforced the agreement. Dillard's Rules of Arbitration, at page 1, provide: "that the Federal Arbitration Act *** shall apply to these rules and govern the arbitration." The parties also established a two-part procedure for resolving all employment-related disputes. A review of the evidence demonstrates that it was undisputed that appellant agreed to the mandatory arbitration of her employment claims. It is also undisputed that

appellant's claims are covered under the Dillard's arbitration procedure.

{¶ 11} The Ohio Supreme Court has recently confirmed that the issue of whether an arbitration agreement is unconscionable is a legal issue involving contract interpretation. *Taylor Bldg. Corp. of Am.*, supra. Arbitration agreements are favored and enforceable under the Federal Arbitration Act and Ohio's Arbitration Act. Here, the arbitration agreement is not unconscionable. The discussion of attorney's fees in this agreement is valid and consistent with applicable law.

{¶ 12} We hereby affirm the lower court's decision compelling arbitration of appellant's claims. The claims were covered by a valid and enforceable arbitration agreement.

{¶ 13} Accordingly, appellant's first assignment of error is overruled.

{¶ 14} Appellant argues in her second assignment of error that the trial court erred in failing to hold an evidentiary hearing as required by R.C. 2711.03. However, we find appellant's argument to be without merit in this case.

{¶ 15} Appellant never informed the trial court that a hearing or discovery was needed to develop the record. In addition, appellant set forth her evidence in an affidavit. Therefore, the court "heard" the parties. While a party's request for an oral hearing shall be granted pursuant to R.C. 2711.03, an oral hearing is not mandatory absent a request. See, e.g., *Cross v. Carnes* (1998), 132 Ohio App.3d 157, 166, 724 N.E.2d 828; *Liese v. Kent State University*, Portage App. No. 2003-P-0033, at 43, 2004-Ohio-5322. Also, see, *Church v. Fleishour Homes, Inc*., 172 Ohio App.3d 205, 216, 2007-Ohio-1806.

{¶ 16} Accordingly, appellant's second assignment of error is overruled.

Judgment affirmed.

It is ordered that appellees recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANTHONY O. CALABRESE, JR., JUDGE

COLLEEN CONWAY COONEY, P.J., CONCURS IN JUDGMENT ONLY WITH SEPARATE OPINION; MARY J. BOYLE, J., DISSENTS WITH SEPARATE OPINION

{¶ 17} COLLEEN CONWAY COONEY, P.J., CONCURRING IN JUDGMENT ONLY: I concur in the judgment and write separately to address a point raised by the dissent. Dillard's requested a nonevidentiary hearing, and Mattox, in her fifteen-page brief opposing Dillard's motion never suggested an oral hearing or further discovery was necessary to develop the record. Rather, she set forth her evidence in an affidavit, and, therefore, I would find that the trial court "heard" the parties, satisfying the statutory requirement. "The parties allowed themselves to be heard *** [T]he nonoral hearing allowed the parties to be heard, as required by R.C. 2711.03." *Church v. Fleishour Homes, Inc.*, 172 Ohio App.3d 205, 2007-Ohio-1806, ¶31, citing *Liese v. Kent State Univ.*, 11th Dist. 2003-P-0033, 2004-Ohio-5322.

BOYLE, M.J., J., DISSENTING:

{¶ 18} Because I find that the trial court erred in failing to hold a hearing on Dillard's motion to compel arbitration, I respectfully dissent.

{¶ 19} A motion to compel arbitration is governed by R.C. 2711.03, which provides in relevant part:

{¶ 20} "(A) The party aggrieved by the alleged failure of another to perform under a written agreement for arbitration may petition any court of common pleas having jurisdiction of the party so failing to perform for an order directing that the arbitration proceed in the manner provided for in the written agreement. *** The court shall hear the parties, and, upon being satisfied that the making of the agreement for arbitration or the failure to comply with the agreement is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the agreement.

{¶ 21} "(B) If the making of the arbitration agreement or the failure to perform it is in issue in a petition filed under division (A) of this section, the court shall proceed summarily to the trial of that issue. ***"

{¶ 22} Under the plain language of R.C. 2711.03, a trial court is required to hold a hearing on a motion to compel arbitration when the enforceability of the arbitration agreement is raised. *Post v. ProCare Auto. Serv. Solutions*, 8th Dist. No. 87646, 2007-Ohio-2106, ¶29, citing *Maestle v. Best Buy Co.*, 100 Ohio St.3d 330, 2003-Ohio-6465, ¶18; see, also, *Eagle v. Fred Martin Motor Co.*, 157 Ohio App.3d

150, 2004-Ohio-829, ¶20; *Brunke v. Ohio State Home Servs.*, 9th Dist. No. 06CA008947, 2007-Ohio-3119, ¶16. Indeed, this court has consistently applied and upheld this requirement, recognizing that "parties should be afforded an evidentiary hearing on the validity of an arbitration clause where unconscionability is raised as an objection to its enforceability." *Marks v. Morgan Stanley Dean Witter Commercial Fin. Servs.*, 8th Dist. No. 88948, 2008-Ohio-1820, ¶22, fn.2, quoting *Post*, supra, at ¶29 (referencing several cases); see, also, *McDonough v. Thompson*, 8th Dist. No. 82222, 2003-Ohio-4655, ¶11 (referencing several cases).

{¶ 23} Here, the trial court granted Dillard's motion to compel arbitration without holding a hearing. Although the majority states that Mattox failed to request a hearing, the record indicates that Dillard's first requested a hearing and Mattox never opposed that request. Prior to issuing its decision, the trial court never notified the parties that it would summarily decide the matter without a hearing. Further, the record reflects that Mattox was attempting to obtain discovery from Dillard's regarding the very issue of the enforceability of the arbitration agreement. Indeed, the trial court decided Dillard's motion only five months after it had been filed but prior to any discovery taking place. Based on this record and the presumption in favor of a hearing, I do not find that Mattox waived her right to a hearing. To the contrary, I believe Mattox rightfully anticipated a hearing and desired to be heard on the issue of unconscionability.

{¶ 24} There are some unique instances, however, where a trial court's failure to hold a hearing does not amount to reversible error. For example, where the record below is well-developed, where the trial court allowed the parties to conduct discovery and to extensively brief the issues, and the parties never requested a hearing nor complained of the lack of a hearing on appeal, appellate courts have declined to remand the case solely for an evidentiary hearing. See *Marks*, supra; *Eagle*, supra.[1] Other courts recognize that it is mandatory for a trial court to hold a hearing if a party requests one, but absent a request, the trial court need not hold an oral hearing. *Church v. Fleishour Homes, Inc.*, 172 Ohio App.3d 205, 2007-Ohio-1806,¶29, citing *Cross v. Carnes* (1998), 132 Ohio App.3d 157, 166.

{¶ 25} In this case, the trial court failed to hold a hearing despite one being requested. I find no unique circumstances in this case that would justify excusing the mandatory hearing requirement of R.C. 2711.03. Here, the parties were not permitted to conduct discovery and the record is not completely developed. Accordingly, I find that the matter should be remanded for a hearing on the issue of the unconscionability of the arbitration agreement. See, generally, *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, ¶52-59 (implicitly recognizing that evidence regarding both the procedural and substantive

[1]Even in these cases, however, the appellate courts still recognized that a hearing is mandatory under R.C. 2711.03 but declined to remand the case based on the unusual circumstances of the proceedings below, namely, the lengthy discovery, the amount of time that had elapsed since the case was filed, the evidence in the record, and the fact that the parties never requested a hearing nor complained of the lack of one on appeal.

unconscionability of an arbitration agreement should be presented at a hearing and failure to present such evidence requires a trial court to enforce arbitration agreement).

{¶ 26} Accordingly, I would sustain Mattox's second assignment of error and remand for a hearing.