[Cite as *Short v. Resource Title Agency, Inc.*, 2011-Ohio-1577.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95839

LINDA M. SHORT

PLAINTIFF-APPELLANT

vs.

RESOURCE TITLE AGENCY, INC., ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-726337

BEFORE: Stewart, P.J., Cooney, J., and E. Gallagher, J.

RELEASED AND JOURNALIZED: March 31, 2011

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MELODY J. STEWART, P.J.:

{¶ 1} Plaintiff-appellant, Linda M. Short, appeals the order of the Cuyahoga County Court of Common Pleas granting the motion to stay pending arbitration filed by defendants-appellees, Resource Title Agency ("Resource Title" or "the Company"), Leslie Rennell, and Andrew Rennell. After reviewing the facts of the case and pertinent law, we affirm.

{¶ 2} Short is a former employee of Resource Title. Leslie Rennell and Andrew Rennell are Resource Title's President and Chief Operating Officer, respectively. As part of the expansion of its National Commercial Division,

Resource Title hired Short as Senior Vice-President and National Account Representative for a term of three years with an annual salary of $165,000, plus commissions and other benefits. These and the other terms of Short's employment were set forth in the employment agreement signed by the parties on July 15, 2009.

{¶ 3} On March 2, 2010, Resource Title terminated Short's employment. On May 11, 2010, Short filed a complaint against Resource Title, Leslie Rennell, Andrew Rennell, and David Kozicki, the Company's Senior Vice-President and Underwriting Counsel who was jointly hired with Short at her suggestion. The complaint asserted claims against Resource Title for breach of contract (Count 1), promissory estoppel (Count 2), breach of an implied covenant of good faith and fair dealing (Count 4),[1] unjust enrichment (Count 5), and unenforceable restrictive covenant (Count 8). The complaint also asserted a claim of fraud against Resource Title, Leslie Rennell, and Andrew Rennell (Count 6), and intentional interference with contract against David Kozicki (Count 7).

{¶ 4} The underlying basis of Short's claims was that Resource Title breached the employment agreement in February 2010 by unilaterally reducing her salary to $100,000, and then terminated her employment in retaliation for her retaining counsel to address the breach. She additionally

[1]There is no Count 3 in appellant's complaint.

asserted that during "pre-employment discussions," Leslie Rennell and Andrew Rennell misrepresented that the company had the resources and the know-how to expand into the Chicago area.

{¶ 5} Resource Title, Leslie Rennell, and Andrew Rennell filed a motion to stay the litigation, pursuant to R.C. 2711.02, pending arbitration per the terms of the arbitration clause in the employment agreement. The trial court granted the motion as to all but two of the claims in Short's complaint. The court found that the claim against Kozicki in Count 7 and the challenge to the noncompete clause in Count 8 were not subject to arbitration.[2] The court stayed further litigation of those two counts pending the completion of arbitration of the other claims. Short timely appeals raising two errors for our review.

{¶ 6} In her first assignment of error, Short argues that the trial court erred in granting the motion to stay because the dispute between the parties does not fall within the scope of the arbitration provision. She contends that her claims against the Company and the other named defendants cannot be maintained without reference to the terms of the confidentiality provision set forth in section 5 of the agreement and that such claims are expressly excluded from arbitration under the terms of the agreement.

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[2]Kozicki did not join in the motion to stay proceedings pending arbitration and is not a party to this appeal. Short's interference with contract claim against him remains pending in the underlying action.

{¶ 7} Pursuant to R.C. 2711.02(B), "[i]f 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 * * * 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 * * *."

{¶ 8} Ohio case law strongly supports the arbitration of disputes. *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 471, 1998-Ohio-294, 700 N.E.2d 859. When a claim falls within the scope of an arbitration provision there is a presumption in favor of arbitration. Id. An agreement to arbitrate must be enforced unless "'it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.'" *Academy of Medicine of Cincinnati v. Aetna Health, Inc.*, 108 Ohio St.3d 185, 2006-Ohio-657, 842 N.E.2d 488, ¶14, quoting *AT & T Technologies, Inc. v. Communications Workers of Am.* (1986), 475 U.S. 643, 650, 106 S.Ct. 1415, 89 L.Ed.2d 648. It is undisputed that employment disputes can be subject to arbitration. See, e.g., *Mattox v. Dillard's, Inc.*, 8th Dist. No. 90991, 2008-Ohio-6488.

{¶ 9} The arbitration clause in this case states:

{¶ 10} "Except for any dispute arising out of, related to or in connection with the terms of Section 5 [confidentiality clause] or 6 [noncompete clause]

above, any other dispute, difference, disagreement or controversy between or among the parties hereto shall be referred to a single arbitrator agreed upon by the parties hereto. The costs and arbitrators' fees of such arbitration will be borne equally by the parties, and each party will be responsible for their own attorneys' fees and other expenses. * * * "

{¶ 11} Under this provision, Count 8 of Short's complaint, which directly challenges the terms of the noncompete clause, is clearly excluded from arbitration. However, Counts 1, 2, 4, 5, and 6, which are based upon or relate to appellees' alleged breach of the written contract relating to compensation (Section 2) and length of employment (Section 3), fall within the scope of the arbitration clause and are referable to arbitration. Accordingly, pursuant to R.C. 2711.02(B), the trial court properly granted appellees' motion to stay litigation pending arbitration.

{¶ 12} Short also challenges the standing of Leslie Rennell and Andrew Rennell to compel arbitration of the claim against them. She argues that neither party signed the agreement in their individual capacity and therefore cannot compel arbitration under the agreement.

{¶ 13} Generally, "parties who have not agreed to arbitrate their disputes cannot be forced to forego judicial remedies." *Cleveland-Akron-Canton Advertising Coop. v. Physician's Weight Loss Ctrs. of Am., Inc.*, 184 Ohio App.3d 805, 2009-Ohio-5699, 922 N.E.2d 1012, ¶14,

citing *Moore v. Houses on the Move, Inc.*, 177 Ohio App.3d 585, 2008-Ohio-3552, 895 N.E.2d 579.

{¶ 14} However, there are instances when equity demands that parties who have not agreed to arbitrate their disputes may be forced to do so when "ordinary principles of contract and agency" require. Id., citing *McAllister Bros., Inc. v. A & S Transp. Co.* (C.A.2, 1980), 621 F.2d 519, 524.

{¶ 15} Under an equitable estoppel theory, "a nonsignatory who knowingly accepts the benefits of an agreement is estopped from denying a corresponding obligation to arbitrate." *I Sports v. IMG Worldwide, Inc.*, 157 Ohio App.3d 593, 2004-Ohio-3113, 813 N.E.2d 4, ¶13. Ohio courts have also recognized an "alternate estoppel theory" whereby "arbitration may be compelled by a nonsignatory against a signatory due to the 'close relationship between the entities involved, as well as the relationship of the alleged wrongs to the nonsignatory's obligations and duties in the contract * * * and [the fact that] the claims were "intimately founded in and intertwined with the underlying contract obligations."'" Id. at ¶14, quoting *Thomson-CSF, S.A. v. Am. Arbitration Assn.* (C.A.2, 1995), 64 F.3d 773, quoting *Sunkist Soft Drinks, Inc. v. Sunkist Growers* (C.A.11, 1993), 10 F.3d 753, 757. Under this theory, because the individual defendants' allegedly wrongful acts related to their actions as agents of the company that was a party to the arbitration agreement, the nonsignatory agents should also have the benefit of the

arbitration agreement made by their principal. See, e.g., *Genaw v. Lieb*, 2d Dist. No. Civ.A. 20593, 2005-Ohio-807.

{¶ 16} In this case, the fraud claim against Leslie Rennell and Andrew Rennell is both intimately intertwined with the underlying employment agreement and relates only to their actions as agents of Resource Title. Leslie Rennell and Andrew Rennell are named in the complaint only in their respective capacities as president and COO of the company, and the address given for them is that of the company. Short's only allegation against the two parties is that they made fraudulent representations during "pre-employment discussions" in which they were acting "on behalf of the company."

{¶ 17} Accordingly, we find this to be one of those limited situations in which a nonsignatory may bind a signatory to an arbitration agreement.

{¶ 18} The first assignment of error is overruled.

{¶ 19} For her second assignment of error, Short asserts that the arbitration clause is unenforceable. She argues first that the agreement was obtained through fraud, and second, that it is both substantively and procedurally unconscionable.

{¶ 20} Arbitration agreements are "valid, irrevocable, and enforceable, except upon grounds that exist at law or in equity for the revocation of any contract." R.C. 2711.01(A). "To defeat a motion for stay brought pursuant to

R.C. 2711.02, a party must demonstrate that the arbitration provision itself in the contract at issue, and not merely the contract in general, was fraudulently induced." *ABM Farms, Inc. v. Woods*, 81 Ohio St.3d 498, 1998-Ohio-612, 692 N.E.2d 574, at the syllabus. Short does not allege that the arbitration agreement was fraudulently induced, nor is there any evidence demonstrating the same. The allegations of fraud and misrepresentation in Short's complaint relate to the contract in general, not to the arbitration clause.

{¶ 21} Unconscionability is also a ground for revocation of a contract. *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, ¶34. "Unconscionability is generally recognized as the 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* (1993), 86 Ohio App.3d 826, 834, 621 N.E.2d 1294. Whether an arbitration clause is unconscionable is a question of law. *Ins. Co. of N. Am. v. Automatic Sprinkler Corp.* (1981), 67 Ohio St.2d 91, 98, 423 N.E.2d 151.

{¶ 22} In reviewing the trial court's determination of whether an arbitration clause 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,* 117 Ohio St.3d 352 at ¶2. The

party challenging the application of the arbitration clause bears the burden of establishing both procedural and substantive unconscionability. Id. at ¶53, citing *Ball v. Ohio State Home Servs., Inc.*, 168 Ohio App.3d 622, 2006-Ohio-4464, 861 N.E.2d 553, ¶6.

{¶ 23} "'Substantive unconscionability involves those factors which relate to the contract terms themselves, and whether they are commercially reasonable.'" *Alexander v. Wells Fargo Fin. Ohio 1, Inc.*, 8th Dist. No. 89277, 2009-Ohio-4873, ¶16, quoting *Schwartz v. Alltel Corp.*, 8th Dist. No. 86810, 2006-Ohio-3353, at ¶23. Procedural unconscionability involves those factors bearing on the relative bargaining position of the contracting parties. *Collins*, 86 Ohio App.3d at 834. These factors may include age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, and whether the terms were explained to the weaker party. Id.

{¶ 24} Short has failed to demonstrate that she was the victim of procedural unconscionability. The trial court found Short to be an educated businesswoman. A footnote in her appellate brief states that she is "college educated with business acumen." Short was hired in the position of senior vice-president, an upper-level management position with a substantial salary. There is no evidence in the record to indicate that she was unaware of the effects of the arbitration provision or limited in her understanding of the

terms of the agreement. Moreover, this court has held in the context of employment contracts, that when a candidate for employment is free to look elsewhere for employment and is not otherwise forced to consent to the arbitration agreement, the agreement to arbitrate is not unconscionable. *Post v. Procare Automotive Serv. Solutions*, 8th Dist. No. 87646, 2007-Ohio-2106, ¶56, citing *Melia v. Office Max N. Am., Inc.*, 8th Dist. No. 87249, 2006-Ohio-4765; *Butcher v. Bally Total Fitness Corp.*, 8th Dist. No. 81593, 2003-Ohio-1734. There is no evidence that Short was not free to look elsewhere for employment or was forced to consent to the arbitration agreement.

{¶ 25} Short argues that the agreement is substantively unconscionable because the provision requiring both parties to bear their own attorney fees and expenses unfairly limits her from obtaining an award for attorney fees as part of her damages. She cites to this court's decision in *Post* for the proposition that the provision in the arbitration agreement requiring each party to be responsible for its own attorney fees is an unconscionable limitation on a party's right to obtain attorney fees as part of damages. *Post* at ¶16. However, *Post* is distinguishable from the instant case. In *Post*, the employees filed suit for employment discrimination under R.C. 4112.02(A) and the critical issue in that case was "whether the limitation on remedies at issue undermines the rights protected by the statute." Id. at ¶15, citing

Morrison v. Circuit City Stores (C.A.6, 2003), 317 F.3d 646, 670, quoting *Gilmer v. Interstate/Johnson Lane Corp.* (1991), 500 U.S. 20, 111 S.Ct. 1647, 114 L.Ed.2d 26.

{¶ 26} Additionally, the Ohio Supreme Court recently found that the provision in a voluntary arbitration agreement requiring both parties to bear their own attorney fees and costs equitably eliminated both parties' ability to recover attorney fees and is not commercially unreasonable. *Hayes v. Oakridge Home*, 122 Ohio St.3d 63, 2009-Ohio-2054, 908 N.E.2d 408.

{¶ 27} Having determined that the agreement to arbitrate is enforceable and that the claims brought by Short, with the exception of Counts 7 and 8, fall within the scope of that agreement, we find no error in the trial court's granting appellees' motion to stay proceedings pending arbitration.

Judgment affirmed.

It is ordered that appellees recover of appellant their costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas 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.

MELODY J. STEWART, PRESIDING JUDGE

COLLEEN CONWAY COONEY, J., and
EILEEN A. GALLAGHER, J., CONCUR