[Cite as *Arnold v. Burger King*, 2015-Ohio-1639.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101465

SHANNON ARNOLD

PLAINTIFF-APPELLEE

vs.

BURGER KING, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-823609

BEFORE: Laster Mays, J., E.A. Gallagher, P.J., and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: April 30, 2015

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ANITA LASTER MAYS, J.:

{¶1} Defendant-appellant Carrols L.L.C. ("Carrols"), which owns and operates Burger King restaurant franchises, appeals from the trial court order that denied its motion to either compel arbitration and to dismiss the complaint or to stay the proceedings filed against it by plaintiff-appellee, its former employee, Shannon Arnold ("Arnold").

{¶2} Upon a review of the record, we disagree with Carrols' assertions. Consequently, the trial court order is affirmed, and this case is remanded for further proceedings consistent with this opinion.

{¶3} This employment dispute arises from an incident where Arnold was raped by her supervisor in the men's bathroom at a Burger King restaurant during working hours. As a term of her employment, Arnold executed a mandatory arbitration agreement ("MAA") in which she agreed to submit to JAMS, Inc. ("JAMS"), a national arbitration association, "any and all disputes, claims or controversies for monetary or equitable relief arising out of or relating to [Arnold's] employment." The agreement also stated that it covered "claims or controversies relating to events *outside the scope of your employment*." (Emphasis added.)

{¶4} Arnold filed her complaint against Burger King, Carrols, and an individual, Terry Matthews ("Matthews"), on March 13, 2014. She alleged that she had been employed by Burger King and Carrols from May 2012 until August 2012 and that

Matthews had been her supervisor. She further alleged that on July 21, 2012, as she "was cleaning the restrooms as part of her duties as an employee" of the defendants, Matthews followed her, grabbed her, "pushed her against the door, and forced her to give him oral sex." Arnold presented five causes of action against the defendants collectively: (1) sexual harassment; (2) respondent superior/negligent retention; (3) emotional distress; (4) assault; and (5) intentional tort.

{¶5} In lieu of an answer, Carrols filed a motion to compel arbitration, pursuant to the MAA. It argued that the Federal Arbitration Act ("FAA") governed the dispute because Carrols is engaged in interstate commerce. It also asserted that the Burger King restaurant where Arnold was raped is one of over 500 franchises owned and operated by Carrols entities, which operates in 13 different states. Carrols further argued that the plain language of the MAA dictates that Arnold's claims be resolved in arbitration.

{¶6} In Arnold's response brief, she conceded that she signed the MAA but argued she was unaware that she was agreeing to arbitrate with anyone other than Carrols Corporation ("Corporation"). She asserted that because Carrols was not a party to the MAA, Carrols could not enforce it. She further argued that her claims fell outside the scope of the MAA agreement and that the agreement was unenforceable because it is overly broad and unconscionable.

{¶7} The trial court denied the motion to compel arbitration without opinion. Carrols now appeals and raises two assignments of error.

{¶8} In the first assignment of error, Carrols argues the trial court erred in denying its motion to stay pending arbitration because the parties had a valid agreement to arbitrate, and Arnold's claims were within the scope of the MAA. In the second assignment of error, Carrols argues that the arbitration clause must be enforced because it is not unconscionable. Carrols' arguments are interrelated; therefore, they are addressed together.[1] *Murea v. Pulte Group, Inc.*, 8th Dist. Cuyahoga No. 100127, 2014-Ohio-398, ¶ 8.

{¶9} Questions of whether a party has agreed to submit an issue to arbitration and whether the arbitration agreement is unconscionable are reviewed under a de novo standard. *Hedeen v. Autos Direct Online, Inc*., 8th Dist. Cuyahoga No. 100582, 2014-Ohio-4200, ¶ 9, citing *McCaskey v. Sanford-Brown College*, 8th Dist. Cuyahoga No. 97261, 2012-Ohio-1543, ¶ 7, and *Taylor Bldg. Corp. Of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12. Under a de novo standard of review, we give no deference to a trial court's decision. *Hedeen* at ¶ 9, citing *Brownlee v. Cleveland Clinic Found*., 8th Dist. Cuyahoga No. 97707, 2012-Ohio-2212, ¶ 9. *Akron v. Frazier*, 142 Ohio App.3d 718, 721, 756 N.E.2d 1258 (9th Dist.2001).

{¶10} Carrols attached to its motion to compel arbitration the affidavit of Gerald DiGenova ("DiGenova"), Vice President of the Human Resources Department of Carrols Restaurant Group, Inc., and copies of several documents. DiGenova explained the

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[1] Carrols failed to cite in the trial court, and fails to cite in its appellate brief, either R.C. 2711.02 or R.C. 2711.03 governing stays and enforcement of arbitration.

corporate relationship between Carrols Restaurant Group, Inc., Carrols L.L.C., and Burger King restaurants. He averred that Carrols adopted the MAA for all employees as of August 1, 2006, and that Arnold executed the MAA at the time she was hired as an employee. DiGenova verified the motion's attached documents that included (1) a copy of the MAA signed by Arnold on May 10, 2012; (2) information about JAMS, the alternative dispute resolution provider named in the MAA; and (3) a complete copy of the JAMS employment arbitration rules and procedures.

{¶11} Arnold responded to Carrols' motion with an opposition brief. Arnold did not dispute that she had signed the MAA. Rather, she argued that Carrols could not enforce the MAA against her, that her claims did not fall under the scope of the MAA, and that the MAA was unconscionable.

{¶12} Arnold's arbitration agreement states, in plain language:

> My agreement to arbitrate Claims extends to Claims against Carrols' officers, directors, managers, employees, owners, attorneys and *agents*, as well as to any dispute you have with *any entity owned, controlled or operated by Carrols Corporation*.

(Emphasis added.)

{¶13} DiGenova's affidavit states that the Corporation is the sole member of Carrols. Therefore, although Carrols is not "a signatory" to the agreement, we agree that it may enforce the agreement as an owner or agent of the Corporation, unless there exists some common law justification to void the contract. *Javitch v. First Union Secs.*, 315 F.3d 619, 629 (6th Dist. 2003).

{¶14} Carrols argues in support of its argument that the MAA should be enforced because the FAA supersedes Ohio law whenever it conflicts with the FAA.[2] Carrols relies on the United States Supreme Court's decision in *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. _____, 132 S.Ct. 1201, 1203, 182 L.Ed.2d 42 (2012). In *Marmet*, family members brought personal injury and wrongful death claims against a Marmet nursing home in West Virginia. The West Virginia Supreme Court held that arbitration agreements that apply to personal injury and wrongful death claims against nursing homes are unenforceable under state law. The West Virginia court also concluded that the FAA did not pre-empt this state public policy.

{¶15} In reversing the West Virginia Supreme Court decision, the U.S. Supreme Court, quoting the FAA, explained:

> The FAA provides that a "written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

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[2] We recognize that the FAA was created in 1925 to address business-to-business arbitration agreements. Grassroots and federal legislative efforts have been underway to address the rights of individuals subject to mandatory arbitration in areas such as employment, consumer protection, nursing homes and Civil Rights. *See, e.g.*, the Arbitration Fairness Act of 2013, S. 878, 113th Cong. (2013); H.R. 1844, 113th Cong. (2013) (bills are identical). See also, Sen. Al Franken's (D-MN) amendment to H.R. 3326, the "Department of Defense Appropriations Act, 2010," prohibiting defense contractors from restricting their employees' abilities to take workplace discrimination, battery, and sexual assault cases to court versus arbitration.

Marmet, at 1203, quoting 9 U.S.C. 2. Based on this provision, the *Marmet* court held that "'[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.'" *Id*., quoting *AT&T Mobility v. Concepcion*, 563 U.S. _____, 131 S.Ct. 1740, 1747, 179 L.Ed.2d 742 (2011). Accordingly, the *Marmet* court concluded that "West Virginia's prohibition against predispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes is a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA." *Id*. at 1204.

{¶16} It is important to note that although the *Marmet* court found that the plaintiffs' claims fell within the scope of the arbitration agreement, it specifically stated that the West Virginia court had to "consider whether, absent th[e] general policy, the arbitration clauses in [plaintiff's cases] are unenforceable under state common law principles that are not specific to arbitration and pre-empted by the FAA." *Id.* In other words, the West Virginia Court was free to find the arbitration agreement unenforceable for common law reasons, such as invalid formation of the contract or unconscionability.

{¶17} Generally speaking, Ohio's public policy encourages arbitration as a method to settle disputes. *Schaefer v. Allstate Ins. Co.*, 63 Ohio St.3d 708, 711-712, 590 N.E.2d 1242 (1992). R.C. 2711.02 states that a trial court "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." As a result, the court indulges a strong presumption in favor of arbitration. *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 471, 700 N.E.2d 859

(1998). In order for an arbitration agreement to be enforceable, however, the agreement must apply to the disputed issue and the parties must have agreed to submit that particular issue or dispute to arbitration. *Ghanem v. Am. Greetings Corp.*, 8th Dist. Cuyahoga No. 82316, 2003-Ohio-5935, ¶12.

{¶18} In this case, the MAA stated in pertinent part as follows:

> * * * Carrols and you agree that any and all disputes, claims or controversies for monetary and equitable relief *arising out of or relating to your employment, even disputes, claims or controversies relating to events occurring outside the scope of your employment* ("Claims") shall be arbitrated before JAMS, a national arbitration association, and conducted under the then current JAMS rules on employment arbitration. Carrols * * * agrees that any arbitration will satisfy JAMS' minimum standards of procedural fairness for employment arbitrations * * * , including the selection of a neutral arbitrator.
>
> Claims subject to arbitration shall include, *without limitation*, disputes, claims, or controversies relating or referring in any manner, directly or indirectly, to Title VII of the Civil Rights Act of 1964 and similar state statutes, * * * the Federal Fair Labor Standards Act or similar state statutes, * * * personal or emotional injury *to you or your family* * * * injuries you believe are attributable to Carrols under theories of * * * *intentional wrongdoing, gross negligence, negligence, or respondent superior*, [and] actions * * * of third parties you attribute to Carrols * * *.
>
> Carrols or you may commence arbitration by providing a written request for arbitration, setting for the subject of the dispute and the relief requested, and an appropriate filing fee to JAMS at 620 Eighth Avenue 34th Floor, New York, New York 10018. A copy of the written request for arbitration *must* be sent to the Carrols Corporation Legal Department * * * via U.S. mail or reputable overnight delivery service * * * Additionally, to the extent permitted by the Procedural Standards [that are not attached to the two page MAA], you agree that any action you bring shall be on an individual and not class or aggregate basis and that you must join all known claims together * * *.
>
> In furtherance of this arbitration program, Carrols will reimburse you 50% of any JAMS filing fee, *if* within two weeks after your request for

> arbitration, proof of payment is delivered to and received by Carrols at the above address.

(Emphasis added.)

{¶19} Arbitration agreements are "valid, irrevocable, and enforceable, except upon grounds that exist at law or in equity for the revocation of any contract." *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, ¶ 33, quoting R.C. 2711.01(A). For example, an arbitration provision may be invalid if it is unconscionable. *Id.* Arnold asserted in the trial court that the MAA was unconscionable. In this case, her assertion has merit.

{¶20} Unconscionability embodies two separate concepts (1) unfair and unreasonable contract terms, i.e., substantive unconscionability, and (2) an absence of meaningful choice on the part of one of the parties, i.e., procedural unconscionability. *Taylor Bldg*. at ¶ 34. A party asserting the unconscionabilty of a contract must prove a quantum of both substantive and procedural unconscionability. *Hayes v. Oakridge Home*, 122 Ohio St.3d 63, 2009-Ohio-2054, 908 N.E.2d 408, ¶ 30; *Taylor Bldg.* at ¶ 34. In other words, these two concepts create a two-prong conjunctive test for unconscionability. *Gates v. Ohio Sav. Assn.*, 11th Dist. Geauga No. 2009-G-2881, 2009-Ohio-6230, ¶ 47; *Strack v. Pelton*, 70 Ohio St.3d 172, 637 N.E.2d 914 (1994).

{¶21} In determining whether an agreement is procedurally unconscionable, courts consider the relative bargaining positions of the parties including each party's age, education, intelligence, experience, and who drafted the contract. *Taylor Bldg.* at ¶ 44. "Procedural unconscionability concerns the formation of the agreement and occurs when

no *voluntary* meeting of the minds is possible." (Emphasis added.) *Bayes v. Merle's Metro Builders/Blvd. Constr*., 11th Dist. Lake No. 2007-L-067, 2007-Ohio-7125, ¶ 11. No single factor alone determines whether a contract is procedurally unconscionable; a court must consider the totality of the circumstances. *Murea v. Pulte Group, Inc.*, 8th Dist. Cuyahoga No. 100127, 2014-Ohio-398, citing *Oakridge Home*, 122 Ohio St.3d 63, 2009-Ohio-2054, 908 N.E.2d 408 at ¶ 29-30.

{¶22} An important consideration is "whether each party to the contract, considering his obvious education or lack of it, [had] a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print?" *Blackburn v. Ronald Kluchin Architects, Inc*., 8th Dist. Cuyahoga No. 89203, 2007-Ohio-6647, ¶ 29, quoting *Vanyo v. Clear Channel Worldwide*, 156 Ohio App.3d 706, 2004-Ohio-1793, 808 N.E.2d 482 (8th Dist.), ¶ 18.

{¶23} There was clearly a "disparity in bargaining power" between Carrols and Arnold. Carrols wrote the MAA as well as the Policy Notice ("Policy Notice") poster regarding the MAA that was posted at the Burger King location. The Policy Notice states that arbitration is "quicker and less expensive for both sides."

{¶24} Typically, employment attorneys represent plaintiffs on a contingency basis so there is often no cost to the employee until success or settlement. Certain federal and state statutes also provide for attorney fees. Arbitration is generally beneficial for employers because it is, as opposed to litigation, less expensive due to brevity and lack of appeal rights. It is also advantageous where, as in this case, the agreement limits the

worker's recovery of damages otherwise available via litigation, "[i]n the event you prevail, [the arbitrator] will limit your relief to compensation for demonstrated and actual injury to the extent consistent with the Procedural Standards [that are not attached to the MAA]."

{¶25} To file a request for arbitration, an employee must send the request to the listed JAMS New York City office with a copy to the Legal Department in Syracuse, New York address with an explanation of the issue. The request must be sent via "U.S. mail or a reputable overnight delivery service." There is no mention of registered or certified mail to verify timeliness.

{¶26} The MAA also states, reassuring the employee of the minimal cost and promoting the cooperative effort that, "Carrols will reimburse you 50% of any JAMS filing fee, *if* within two weeks after your request for arbitration, proof of payment is delivered to and received by Carrols at the above address." (Emphasis added.) What constitutes proof of payment is not described.

{¶27} The Policy Notice is also misleading because it contradicts the terms of the MAA. The Policy Notice states, "employment related disputes that cannot be resolved internally will proceed to arbitration rather than in a lawsuit." The Policy Notice does not say that disputes arising outside the scope of employment are also required to proceed to arbitration. One may be willing to arbitrate disputes that arise in the course of employment. It is an entirely different scenario when one agrees to arbitrate claims that

arise outside the scope of employment because the variety of potential claims is practically infinite and unforeseeable.

{¶28} We do not attempt to elaborate on every provision of the MAA that is overly broad in scope and difficult, if not impossible, for a lay person to understand.

{¶29} Courts will also consider, on the issue of procedural unconscionability, "whether alterations in the printed terms were possible," *Oakridge Home* at ¶ 23, and whether the parties had alternatives to entering into the contract. *Rupert v. Macy's Inc*., N.D. Ohio No. 1:09CV2763, 2010 U.S. Dist. LEXIS 54050 (June 2, 2010). No single factor alone determines whether a contract is procedurally unconscionable; a court must consider the totality of the circumstances. *Oakridge Home* at ¶ 29-30.

{¶30} In *Rupert*, the district court determined that, under Ohio law, an arbitration program formed a valid contract between the corporate employer and the employee because the employee failed to affirmatively opt out of the program and the agreement was supported by consideration. *Id.* at ¶ 17. According to that court, the consideration was the employee's continued employment and the employer's agreement to pay the costs of arbitration. *Id.* at ¶ 23. The court thus affirmed the validity of the arbitration agreement.

{¶31} This court is not persuaded by *Rupert*'s reasoning. In this case, Carrols drafted the MAA and presented it to Arnold as a condition for hiring her at a Burger King restaurant. As for Arnold's bargaining power, the choice was either sign it or remain unemployed. There is no evidence that Arnold could alter any of its terms. Under these

circumstances, the arbitration provision in the agreement was procedurally unconscionable. *Rude v. NUCO Edn. Corp.*, 9th Dist. Summit No. 25549, 2011-Ohio-6789.

{¶32} If Arnold refused to sign the agreement, Arnold would not be employed. There was no other alternative. Thus, Carrols had significantly greater bargaining power. This difference in bargaining power, by itself, would not be sufficient to rescind the MAA. However, Carrols also drafted the MAA and the Policy Notice, which were misleading and would give an ordinary reasonable person a false sense of security.

{¶33} The MAA's terms were not only procedurally unconscionable but also were substantively unconscionable as they applied to:

> * * * any and all disputes, claims or controversies for monetary and equitable relief arising out of or relating to your employment * * *[, including,] * * * *without limitation*, disputes, claims, or controversies relating or referring in any manner, directly or indirectly, to Title VII of the Civil Rights Act of 1964 and similar state statutes, * * * the Federal Fair Labor Standards Act or similar state statutes, * * * *injuries you believe are attributable to Carrols under theories of * * * intentional wrongdoing, gross negligence, negligence, or respondent superior, [and] actions * * * of third parties you attribute to Carrols * * *.* Any agreement to arbitrate Claims *extends to Claims against Carrols'* officers, directors, *managers*, employees, owners, attorneys and agents, *as well as to any dispute you have with any entity owned, controlled or operated by Carrols Corporation.*

(Emphasis added.)

{¶34} Inasmuch as the MAA sought to include every possible situation that might arise in an employee's life, the clause is substantively unconscionable as the arbitrator would be resolving disputes unrelated to employment. *See, e.g., Drake v. Barclay's Bank Del. Inc.*, 8th Dist. Cuyahoga No. 96451, 2011-Ohio-5275. It is ordinarily not

within an arbitrator's purview to determine whether one employee was raped by another. *Compare Cleveland v. Fraternal Order of Police, Lodge No. 8*, 76 Ohio App.3d 755, 603 N.E.2d 351 (8th Dist.1991) (arbitration agreement permitted arbitrator to determine if discharge was appropriate punishment for police officer who committed rape of a civilian that the officer alleged occurred while off duty.)

{¶35} Thus, Arnold established both prongs of the conjunctive two-part unconscionability test. The trial court consequently appropriately denied Carrols' motion to either compel arbitration and dismiss the case or stay litigation pending arbitration. Carrols' assignments of error are overruled.

{¶36} The trial court's order is affirmed, and this case is remanded for further proceedings consistent with this opinion.

It is ordered that appellee 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.

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ANITA LASTER MAYS, JUDGE

EILEEN A. GALLAGHER, P.J., and
EILEEN T. GALLAGHER, J., CONCUR