[Cite as *Yoby v. Cleveland,* 2023-Ohio-2180.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

CLINT YOBY, ET AL.,	:	
Plaintiffs-Appellees,	:	No. 112013
v.	:	
CITY OF CLEVELAND, ET AL.,	:	
Defendants-Appellants.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: REVERSED AND REMANDED
RELEASED AND JOURNALIZED: June 29, 2023

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-15-852708

Appearances:

Merriman Legando Williams & Klang, LLC, Drew Legando, Tom Merriman, and Edward S. Jerse; Bashein & Bashein Co., LPA, W. Craig Bashein, and John Hurst; Scott+Scott LLP, Geoffrey M. Johnson, and Deborah Clark-Weintraub (pro hac vice); Meyers, Roman, Friedberg & Lewis, and Peter Turner; Brakey Law LLC, and Carolyn Brakey, *for appellees*.

Mark Griffin, Director of Law, and Delante Spencer Thomas, Chief Assistant Director of Law; Zashin & Rich Co., L.P.A., Stephen J. Zashin, Sarah J. Moore, and Jzinae N. Jackson; Carpenter Lipps & Leland LLP, Jeffrey A. Lipps, Kimberly W. Bojko, Angela Paul Whitfield, and Jonathan Wygonski, *for appellant*.

MARY J. BOYLE, J.:

{¶ 1} This case arises from a class action lawsuit filed by plaintiffs-appellees, Clint Yoby, et al. (collectively "appellees"), against defendant-appellant, the city of Cleveland ("the City"), regarding whether the City was authorized to assess certain adjustments on appellees' Cleveland Public Power ("CPP") electric bills. Seven years into this litigation, the City enacted Ordinance No. 472-2022, which amended appellees' CPP contracts and provided that arbitration shall be the exclusive forum to resolve disputes regarding rates and services provided by CPP. The City then sought to stay the proceedings and compel arbitration against appellees, basing its motion on the recently enacted ordinance. We are now asked to determine whether the trial court erred in denying the City's motion to stay proceedings and compel arbitration against appellees. For the reasons set forth below, we reverse and remand for a trial as set forth in R.C. 2711.03(B).

I. Facts and Procedural History

{¶ 2} This is the second appeal in this case, and the background was previously set forth by this court in the prior appeal, *Yoby v. Cleveland*, 2020-Ohio-3366, 155 N.E.3d 258, (8th Dist.), *discretionary appeal not allowed*, 162 Ohio St.3d 1411, 2021-Ohio-961, 65 N.E.3d 338 (Mar. 30, 2021):

> The city's municipally owned utility [CPP] sells electric power to customers in Cleveland, including residential, commercial, and industrial customers such as the [plaintiffs] in this case.

> In the 1970s, CPP generated electric power and distributed it to its customers.
>
> * * *
>
> By 1977, CPP essentially ceased generating power and became an electricity reseller. The parties admit that between 1974 and 1984, CPP did not assess any costs that would qualify for recoupment under the Environmental and Ecological Adjustment (hereinafter "EEA").
>
> In 1984, CPP began levying adjustments to customers' electric bills under the authority of an EEA. It is stipulated that between 1984 and 2013, CPP generated $188 million in revenue by making these adjustments. When these adjustments were assessed, the charges were not separately delineated or identified on the bills. Instead, the amounts were combined with the other city council-approved adjustment — the Energy Adjustment Charge (hereinafter "EAC"). Accordingly, customer bills would list the base-rate charges and an additional "Energy Adjustment Charge," which would include adjustments under both the EAC and EEA.
>
> [Plaintiffs] brought suit against the city contending (1) that CPP was not authorized to adjust customer bills pursuant to [Cleveland Codified Ordinances ("C.C.O.") 523.17] to recover the EEA costs incurred because those costs were not authorized under the ordinance; and (2) CPP was required to separately identify on customer bills the amounts assessed for an EEA, instead of embedding them into a single line item identified as "Energy Adjustment Charge." According to [plaintiffs], the city's actions constituted a breach of contract and fraud.
>
> Both parties moved for summary judgment. The city sought full and complete summary judgment on all claims [breach of contract, fraud, declaratory judgment, injunction, and unjust enrichment], and [plaintiffs] sought partial summary judgment on their breach of contract cause of action. The trial court granted the city's motion for summary judgment, denied [plaintiffs'] motion for partial summary judgment, and entered judgment in favor of the city on all claims of the complaint.

Id. at ¶ 2-3, 5-8.

{¶ 3} On appeal, this court considered whether the City was authorized to assess these adjustments on the plaintiffs' electric bills. We concluded that the City

was not entitled to summary judgment on plaintiffs' breach-of-contract claim because there was a "material question of fact whether the aggregate revenues collected under the base rates and the authorized adjustment charges exceeded that permitted by both the base rates and the other ordinances." *Id.* at ¶ 76. We further found that the city was entitled to immunity on the plaintiffs' claims for fraud because the plaintiffs "presented no evidence that their fraud claims fell within any of the exceptions in R.C. 2744.02(B)." *Id.* at ¶ 87. With regard to the plaintiffs' claims for restitution, unjust enrichment, and declaratory relief, we found that these claims were based upon the same facts as those supporting their claim for breach of contract. *Id.* at ¶ 79. As a result, summary judgment was inappropriate as to these causes of action and the matter was remanded to the trial court for further proceedings. *Id.* at ¶ 79, 110.

{¶ 4} Following our remand, the matter was set for a jury trial in October 2021, which was ultimately rescheduled for trial in October 2022. The October 2022 trial date was set at a May 11, 2022 telephone conference regarding the case management schedule. Two weeks later, on May 25, 2022, the City enacted Ordinance No. 472-2022, which contained amendments to C.C.O. Chapter 523 — Rules and Rates. This ordinance was "[a]n emergency ordinance to clarify and amend various sections of Chapter 523 of the Codified Ordinances of Cleveland, Ohio, 1976, as amended or supplemented by various ordinances; and to supplement the codified ordinances by enacting new Sections 523.115 and 523.27." Cleveland City Ordinance No. 472-2022.

{¶ 5} Relevant to the instant case, the ordinance contained a new section, C.C.O. 523.115 — Cleveland Public Power Arbitration Panel, which provides arbitration as the exclusive forum to handle all disputes arising under C.C.O. Chapter 523. It states, "The Arbitration Panel has the exclusive authority to review all disputes under this Chapter and to make determinations with regard to the matters presented to it. These determinations shall be binding on the City and the petitioning customer, except that the Commissioner shall have the authority to order that electric service not be terminated." C.C.O. 523.115(b). The ordinance also amended C.C.O. 523.19(b) — Electric Service Agreement, by adding the following: "ART. 8: The Consumer agrees that the exclusive forum for all disputes regarding rates and charges for service provided by the Division of Cleveland Public Power or other issues arising from Chapter 523 or this agreement shall be resolved by the Arbitration Panel as set forth in Section 523.115."

{¶ 6} The change of terms provision in the ESA provide:

> ART. 3: For the electric service furnished under this contract, the Consumer agrees to pay the City in accordance with the terms, conditions and applicable rate schedule(s) established by or as may be amended from time to time by the City and approved by City Council, and said rates, terms and conditions are hereby made a part of this agreement the same as if incorporated herein.
>
> ART. 4: The Consumer agrees to comply with all the rules and regulations as may be established by the City, including the rules and regulations associated with all rates, terms and conditions of the applicable rate schedule(s), as may be amended from time to time by the City and approved by City Council, all of which are by reference made a part of this agreement.

C.C.O. 523.19(b). The ordinance also included a provision stating that "it is Council's intent to make this Ordinance retroactive to the fullest extent permitted by law[.]" Cleveland City Ordinance No. 472-2022.

{¶ 7} On June 21, 2022, the City filed a motion to stay proceedings and compel arbitration. The City, relying on C.C.O. 523.115 and *Pivonka v. Corcoran*, 162 Ohio St.3d 326, 2020-Ohio-3467, 165 N.E.3d 1098, argued that the CPP Arbitration Panel has exclusive authority and jurisdiction to preside over all disputes arising under C.C.O. Chapter 523.[1] The appellees' opposed arbitration, arguing that: (1) the City does not have the power to limit the trial court's jurisdiction; (2) *Pivonka* is distinguishable; (3) there is no proof of an agreement to arbitrate; (4) under the terms of the ordinance itself, the City does not have a right to compel; (5) the City's modification of the contract is procedurally unconscionable; (6) the City's arbitration panel is substantively unconscionable; and (7) the City waived any right to arbitrate. The trial court scheduled an oral argument to hear the parties' respective positions on the motion in September 2022. At the beginning of the argument, the court stated:

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[1] In *Pivonka*, the plaintiffs in a class action sought a declaratory judgment that former R.C. 5101.58, which relates to Medicaid reimbursements, is unconstitutional and also sought to recover all sums paid to the Ohio Department of Medicaid under that statute. *Id.* at ¶ 1. The Ohio Supreme Court was asked to determine whether the common pleas court had subject-matter jurisdiction over the class action. *Id.* The *Pivonka* Court found that the common pleas court lacked subject-matter jurisdiction over the class action for the named and prospective class plaintiffs whose claims for recovery fell within express language of R.C. 5160.37 because the statute provided the sole remedy for Medicaid program participants to recover excessive reimbursement payments made to the Ohio Department of Medicaid on or after September 29, 2007. *Id.* at ¶ 2.

> At this particular time the Court is going to make sure that we all understand what we're doing here today, so we're going to set the parameters. Number one, this is not an evidentiary hearing. Each of the parties have presented to this Court filings, pleadings. The Court has had an opportunity to review them. We have the motion of the defendant, City of Cleveland, to stay proceedings and compel arbitration, which was filed on June 21, 2022.
>
> The plaintiffs have filed opposition to the defendant's motion to compel arbitration as well. And, the Court, although it has reviewed all that, is going to allow you to make your arguments for the record today.
>
> Now, I'm hoping you each can do it in 30 minutes. But at the max, I've giving you 45. So think about that. Because we're not going to be here all afternoon. All right. This is simply on these matters, it's not evidentiary.

(Sept. 23, 2022, tr. 4-5.)

{¶ 8} Following the oral argument, the trial court issued an opinion denying the City's motion to stay proceedings and compel arbitration. The court found that (1) it has jurisdiction to evaluate the ordinance and the change in terms provision of the contract; (2) the contract does not allow for retroactive modification; (3) the unilateral imposition of arbitration by the City under the change in terms provision is not within the contemplation of the parties at the time of the initial agreement and is unconscionable and unenforceable; (4) the provisions of C.C.O. 523.115 governing appointment of the arbitration panel are unconscionable; and (5) the City waived its right to arbitrate "by waiting seven years to attempt to rely upon the change in terms provision of the contract to compel arbitration by ordinance." (Judgment entry, 09/29/23.)

{¶ 9} It is from this order that the City now appeals, raising the following single assignment of error for review:

> **Assignment of Error One:** The trial court erred in denying [the City's] motion to stay proceeding and compel arbitration.

II. Law and Analysis

{¶ 10} The City advances several reasons as to why the trial court erred, including that (1) under *Pivonka*, 162 Ohio St.3d 326, 165 N.E.3d 1098, 2020-Ohio-3476, the City is permitted to enact remedial legislation affecting the method or procedure to adjudicate rights retroactively; (2) the trial court erred by failing to hold an evidentiary hearing under R.C. 2711.03(A); (3) the trial court erred by failing to summarily proceed to trial under R.C. 2711.03(B) because an issue exists as to the validity or enforceability of the arbitration agreement; (4) the trial court erred in finding the City waived its right to arbitrate; (5) the trial court erred in determining that administrative arbitration panel and procedures set forth in C.C.O. 523.115 are unconscionable; and (6) the trial court erred by not staying the matter pending arbitration under R.C. 2711.02(B). Our discussion, however, focuses on the R.C. 2711.03(B) trial requirement as it is dispositive.

A. Standard of Review

{¶ 11} We apply a de novo standard of review to questions of whether a party has agreed to submit an issue to arbitration or questions of unconscionability. *Paulozzi v. Parkview Custom Homes, L.L.C.*, 2018-Ohio-4425, 122 N.E.3d 643, ¶ 12 (8th Dist.), citing *Brownlee v. Cleveland Clinic Found.*, 8th Dist. Cuyahoga No. 97707, 2012-Ohio-2212; *N. Park Retirement Community Ctr., Inc. v. Sovran Cos.*, Ltd., 8th Dist. Cuyahoga No. 96376, 2011-Ohio-5179. Under a de novo standard of

review, we give no deference to the trial court's decision. *Brownlee* at ¶ 9, citing *Akron v. Frazier*, 142 Ohio App.3d 718, 721, 756 N.E.2d 1258 (9th Dist.2001).

B. Ohio Arbitration Act

{¶ 12} We recognize that Ohio public policy favors enforcement of arbitration provisions. Arbitration is encouraged as a method of dispute resolution and a presumption favoring arbitration arises when the claim in dispute falls within the arbitration provision. *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 471, 700 N.E.2d 859 (1998). We note, however, that "parties cannot be compelled to arbitrate a dispute in which they have not agreed to submit to arbitration." *Marks v. Morgan Stanley Dean Witter Commercial Fin. Servs.*, 8th Dist. Cuyahoga No. 88948, 2008-Ohio-1820, ¶ 15, citing *Piqua v. Ohio Farmers Ins. Co.*, 84 Ohio App.3d 619, 621, 617 N.E.2d 780 (2d Dist.1992); *St. Vincent Charity Hosp. v. URS Consultants, Inc.*, 111 Ohio App.3d 791, 793, 677 N.E.2d 381 (8th Dist.1996); *Shumaker v. Saks, Inc.*, 163 Ohio App.3d 173, 2005-Ohio-4391, 837 N.E.2d 393 (8th Dist.).

{¶ 13} Ohio's policy of encouraging arbitration has been declared by the legislature through the Ohio Arbitration Act — R.C. Chapter 2711. *Goodwin v. Ganley*, Inc., 8th Dist. Cuyahoga No. 89732, 2007-Ohio-6327, ¶ 8. The Ohio Arbitration Act allows for direct enforcement of arbitration agreements through an order to compel arbitration under R.C. 2711.03 or indirect enforcement through an order staying proceedings under R.C. 2711.02, or both. *Maestle v. Best Buy Co.*, 100 Ohio St.3d 330, 2003-Ohio-6465, 800 N.E.2d 7, ¶ 18; *Brownlee v. Cleveland Clinic Found.*, 8th Dist. Cuyahoga No. 97707, 2012-Ohio-2212, ¶ 11. Although these

provisions each require a trial court to determine whether an arbitration provision is enforceable, they are separate and distinct procedures.

{¶ 14} With these principles in mind, we turn to whether there is an issue as to the validity or enforceability of the arbitration agreement and whether the trial court erred by failing to proceed to trial under R.C. 2711.03(B).

C. R.C. 2711.03 — Motion to Compel Arbitration

{¶ 15} R.C. 2711.03 is titled "Enforcing arbitration agreement" and provides in relevant part:

> (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.
>
> (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*. If no jury trial is demanded as provided in this division, the court shall hear and determine that issue.

(Emphasis added.) *Id.*

{¶ 16} Based on the foregoing, when reviewing motions to compel arbitration under R.C. 2711.03, the trial court must engage in the following process: (1) the court shall first hear the parties to determine whether the validity of the arbitration provision is in issue; (2) if the court is satisfied that the making of the arbitration agreement or the failure to comply with the agreement is not in issue,

the court shall then make an order directing the parties to proceed to arbitration in accordance with the agreement; (3) if the court, however, finds that the making of the arbitration agreement or the failure to perform it is at issue, then the court "shall proceed summarily to the trial of that issue." R.C. 2711.03(A)-(B).

{¶ 17} This court has consistently found that "[w]here the existence of the contract containing the arbitration clause is at issue, a question of fact arises which is subject to trial." *Ison v. State Farm Mut. Auto. Ins. Co.*, 148 Ohio App.3d 465, 2002-Ohio-3762, 773 N.E.2d 1101, ¶ 35 (8th Dist.), citing *Colegrove v. Handler*, 34 Ohio App.3d 142, 144-145, 517 N.E.2d 979 (10th Dist.1986); *Schroeder v. Shearson, Lehman & Hutton, Inc.*, 8th Dist. Cuyahoga No. 60236, 1991 Ohio App. LEXIS 1826, 7-8 (Apr. 25, 1991) [W]here this court held that the issue of arbitrability of the dispute should have been addressed in a trial because the complaint put in issue the existence of the arbitration agreement due to the plaintiff's claim that the contract was never executed by him.); *McDonough v. Thompson*, 8th Dist. Cuyahoga No. 82222, 2003-Ohio-4655, ¶ 12 (where this court stated that "[e]ven though R.C. 2711.03 does not necessarily require the trial court to conduct a trial, it must, nonetheless, proceed summarily to trial when it finds that the validity of the arbitration agreement is in issue and the party challenging it has sufficient evidence supporting its claim."); *Squires Constr. Co. v. Thomas*, 8th Dist. Cuyahoga No. 89609, 2008-Ohio-1406, ¶ 22 (where this court stated, "[a]ccording to the specific language of R.C. 2711.03, factual issues regarding the existence of an arbitration

agreement or its enforcement are tried to the court unless either party requests a jury trial.")

{¶ 18} "'When determining whether a trial is necessary under R.C. 2711.03, the relevant inquiry is whether a party has presented sufficient evidence challenging the validity or enforceability of the arbitration provision to require the trial court to proceed to trial before refusing to enforce the arbitration clause.'" *McDonough* at ¶ 13, quoting *Garcia v. Wayne Homes*, 2d Dist. Clark No. 2001 CA 53, 2002-Ohio-1884, ¶ 29. We note that "Revised Code Chapter 2711 does not set forth the amount of evidence that must be produced to receive a trial under R.C. 2711.03." *Id.* at ¶ 14. This court has followed the guidance from federal case law interpreting corresponding Section 4 of the Federal Arbitration Act, and under this approach, "'courts are directed to address the matter as they would a summary judgment exercise, proceeding to trial where the party moving for the jury trial sets forth specific facts demonstrating that a genuine issue of material fact exists regarding the validity or enforceability of the arbitration agreement.'" *Id.*, quoting *Garcia* at ¶ 30, citing *Cross v. Carnes*, 132 Ohio App.3d 157, 166, 724 N.E.2d 828 (11th Dist.1998), citing *Topf v. Warnaco, Inc.*, 942 F.Supp. 762, 766-767 (D.Conn.1996). Under the summary judgment standard, "[t]he moving party carries an initial burden of setting forth specific facts that demonstrate his or her entitlement to summary judgment." *Squires Constr. Co. v. Thomas*, 8th Dist. Cuyahoga No. 89609, 2008-Ohio-1406, at ¶ 26, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996).

{¶ 19} In the instant case, the City sought to compel arbitration, relying on the arbitration procedure it recently enacted through Cleveland City Ordinance No. 472-2022. The City maintains that the contracts between CPP and appellees incorporate any amendments to the terms in C.C.O. Chapter 523, thereby allowing the City to invoke the newly enacted arbitration provision. The appellees, however, clearly challenge the existence of an agreement to arbitrate. The appellees contend that there is no valid written agreement to arbitrate because there is no evidence that (1) the City provided class members notice of the proposed change to their ESA; (2) the City gave class members an opportunity to accept or reject the new arbitration provision; and (3) any class members accepted or signed an arbitration agreement. The appellees further contend that there is no agreement to arbitrate between them and the City because (1) the City cannot unilaterally impose an arbitration clause into a contract; (2) the City cannot impose an arbitration clause that is retroactive; (3) the City waived its right to arbitrate; and (4) the arbitration clause is unconscionable.

{¶ 20} These arguments directly challenge the existence of the City's arbitration clause and whether the parties ever agreed to arbitrate, demonstrating that a genuine issue of material fact exists regarding the validity or enforceability of the arbitration agreement. Therefore, R.C. 2711.03 mandates that the trial court proceeds to trial on the City's motion to compel. We acknowledge that while the trial court heard the parties as set forth in R.C. 2711.03(A), the making of the arbitration agreement was at issue and therefore, the trial court was required under

R.C. 2711.03(B) to "proceed summarily to the trial of that issue." As a result, we find that the trial court erred when it denied the City's motion to compel arbitration without first proceeding to trial on the making of the arbitration agreement.

{¶ 21} Because of our disposition of this portion of the City's assignment of error, we decline to address the remaining portions of the assigned error.

{¶ 22} Therefore, the City's assignment of error is sustained.

III. Conclusion

{¶ 23} A review of the record reveals that there is a genuine issue of material fact regarding whether the parties ever agreed to arbitrate and whether the arbitration clause exists. Under R.C. 2711.03(B), the trial court was required to proceed to trial on that issue. Therefore, we find that the trial court erred by denying the City's motion to compel arbitration without first proceeding to trial on the issue of the making of the arbitration agreement. We note that the trial court and parties should not construe our opinion as being a ruling on any particular fact or legal issue beyond our finding that the trial court was required to proceed to trial in this matter.

{¶ 24} Accordingly, judgment is reversed and the matter is remanded to the trial court for a trial as set forth in R.C. 2711.03(B).

It is ordered that appellants and appellees share 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.

MARY J. BOYLE, JUDGE

ANITA LASTER MAYS, A.J., and
MICHELLE J. SHEEHAN, J., CONCUR