[Cite as *Okolish v. Town Money Saver, Inc.*, 2023-Ohio-2865.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

KIM OKOLISH Appellee v. TOWN MONEY SAVER, INC., et al. Appellants	C.A. No. 30261 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV-2020-07-1883

DECISION AND JOURNAL ENTRY

Dated: August 16, 2023

HENSAL, Judge.

{¶1} Town Money Saver, Inc. and TMS Franchising, Inc. appeal a judgment of the Summit County Court of Common Pleas that denied their motion to compel arbitration. For the following reasons, this Court reverses.

I.

{¶2} Kim Okolish filed a complaint against Town Money Saver and TMS that she later amended, alleging breach of contract and conversion and seeking a declaratory judgment. According to the amended complaint, in 1996, Ms. Okolish began mailing out a monthly coupon clipper magazine to households in the Canal Fulton area. The following year, William Zirzwow invited her to join him in doing the same thing under the name Town Money Saver. Ms. Okolish accepted, and, over the following years, she gradually expanded the territory over which she operated. Under their agreement, Mr. Zirzwow published the materials, but Ms. Okolish maintained control over her accounts and clients.

{¶3} In 2005, Mr. Zirzwow incorporated TMS. According to the amended complaint, in 2008, he demanded that Ms. Okolish become a TMS franchisee or she would not be allowed to continue using the Town Money Saver name. A few years later, she purchased additional territory from another TMS franchisee. The person who sold her the territory ended up creating a new company that competed against her. Ms. Okolish, therefore, sought to exercise a provision in the franchise agreement that required TMS to purchase territory from a franchisee seeking to sell it. TMS did not do complete the purchase for nearly a year, causing Ms. Okolish losses. It also transferred some of her other territories to a new franchisee without her approval or providing any compensation to her. Finally, in 2020, it transferred the remainder of her territory from her without compensation and alleged that she owed it over $127,000 in unpaid printing costs.

{¶4} Town Money Saver and TMS filed a motion to compel arbitration, citing an arbitration provision in the franchise agreement. Following a hearing, the trial court denied the motion, concluding that the arbitration provision was procedurally and substantively unconscionable. Town Money Saver and TMS have appealed, assigning as error that the trial court incorrectly denied their motion.

II.

ASSIGNMENT OF ERROR

> THE TRIAL COURT ERRED IN NOT GRANTING APPELLANTS' MOTION TO COMPEL ARBITRATION, BECAUSE THE OPERATIVE FRANCHISE AGREEMENT BETWEEN THE PARTIES CONTAINS A CLEAR, UNAMBIGUOUS PROVISION REQUIRING ARBITRATION OF ALL DISPUTES ARISING FROM THE AGREEMENT, IN CONFORMITY WITH OHIO'S ARBITRATION ACT, R.C. § 2711, ET. SEQ.

{¶5} Town Money Saver and TMS argue that the trial court improperly refused to enforce the franchise agreement's arbitration clause. "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, ¶ 33 (quoting R.C. 2711.01(A)). "Unconscionability is a valid basis for revoking a contract." *Crouse v. LaGrange Junction Ltd.*, 9th Dist. Lorain No. 11CA010065, 2012-Ohio-2972, ¶ 7.

{¶6} "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.'" *Taylor* at ¶ 34, quoting *Lake Ridge Academy v. Carney*, 66 Ohio St.3d 376, 383 (1993). "The party asserting unconscionability of a contract bears the burden of proving that the agreement is both procedurally and substantively unconscionable." *Id*., citing *Collins v. Click Camera & Video Inc.*, 86 Ohio App.3d 826, 834 (2d Dist.1993) ("One must allege and prove a 'quantum' of both prongs in order to establish that a particular contract is unconscionable")). "[T]he party must show that the arbitration clause itself is unconscionable." *Id*. at ¶ 42. "The issue of unconscionability is a question of law." *Eagle v. Fred Martin Motor Co.*, 157 Ohio App.3d 150, 2004-Ohio-829, ¶ 12 (9th Dist.). This Court, therefore, reviews a trial court's unconscionability decision de novo. *Taylor* at ¶ 2.

{¶7} In determining whether an arbitration provision is procedurally unconscionable, we 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.'" (Alterations in original.) *Id*. at ¶ 44, quoting *Collins* at 834.

> Factors which may contribute to a finding of unconscionability in the bargaining process [i.e., 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 reasonably to 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., quoting Restatement of the Law 2d, Contracts, Section 208, Comment d (1981).

{¶8} The trial court found that Ms. Okolish testified credibly that she did not have the benefit of the lawyer that Town Money Saver claimed it provided to potential franchisees. It noted that the franchise agreement was 59 pages in length and that the arbitration provision started on page 40 and continued until page 43. It also found that Ms. Okolish was credible in testifying that she felt as if she had no choice but to enter into the agreement when she did. It also found that Mr. Zirzwow gave her an ultimatum to enter into the agreement or forfeit her business and marketing area, which she had been operating under for a decade.

{¶9} Some of the trial court's findings are not supported by the record. Contrary to the court's finding that Ms. Okolish had to sign the agreement or forfeit her business, Mr. Zirzwow testified that he had never required any of the Town Money Saver dealers to become franchisees. In fact, there were still three people operating under their old dealership agreements at the time of the hearing in 2021. Ms. Okolish also did not testify that she faced an ultimatum. According to Ms. Okolish, when she and the other dealers first received the proposed franchise agreement, no one wanted to sign it. The problem, however, was that she was not "able to open any more markets" and was not "able to take over a market from somebody else unless [she] signed the agreement." Ms. Okolish testified that the choice she lacked was that, if she did not sign the franchise agreement, she would "just kind of stay[ ] where [she] was at." She later testified that she "felt at that time that I had no choice to sign it or I wasn't going to be able to move forward with Town Money Saver." She did not explain what she meant by "move forward" but her later testimony was consistent with her prior testimony about not being able to grow her business if she did not become a franchisee.

{¶10} Ms. Okolish testified that she has a high school education. Although she initially worked as a graphic designer, she later started her own advertising business. Between her initial coupon clipper operation and as a dealer for Town Money Saver, at the time she signed the franchise agreement she had over a decade of experience forming business contracts. There was no evidence presented that she had any sort of intellectual disability or significant health concerns at the time of the signing. She did not have any legal experience but testified that she read the agreement before signing it and that she generally tries to understand what she is signing before doing so. She agreed that she had the opportunity to consult with an attorney or other advisor before signing the agreement. The agreement also contained a separate acknowledgements section where Ms. Okolish agreed that she had conducted an independent investigation of all aspects relating to the franchised business, that she had read and understood the agreement, and that she had been accorded ample time to consult with advisors of her own choosing about the potential benefits and risks of entering into the agreement.

{¶11} Upon review of the record, we conclude that the trial court incorrectly determined that the arbitration provision was procedurally unconscionable. The arbitration provision was the second to last section of the agreement and was in standard, rather than fine, print. *See Taylor*, 117 Ohio St.3d 352, 2008-Ohio-938, at ¶ 46. There was no evidence that Ms. Okolish was hurried through the signature process. *See id*. To the contrary, she received the franchise agreement three years before she signed it. There was no evidence that she would face the loss of her business if she did not sign the agreement; she only had to become a franchise if she wanted to expand the size of her operation under the Town Money Saver name. Ms. Okolish also had experience creating and operating her own coupon mailer.

{¶12} Because this Court has determined that the arbitration provision is not procedurally unconscionable, "it is unnecessary for us to review whether it is substantively unconscionable." *Long v. N. Illinois Classic Auto Brokers*, 9th Dist. Summit No. 23259, 2006-Ohio-6907, ¶ 16. Town Money Saver's and TMS's assignment of error is sustained.

{¶13} We note that, in her opposition to the motion to compel arbitration, in addition to arguing unconscionability, Ms. Okolish argued that the trial court should deny the motion because Town Money Saver, Inc. was not a party to the franchise agreement and because not all her claims arise out of the agreement. Because the trial court concluded that the arbitration provision was not enforceable because it was procedurally and substantially unconscionable, it did not address Ms. Okolish's other arguments. This Court will not consider those arguments in the first instance. *McGlumphy v. Richard T. Kiko Agency, Inc.*, 9th Dist. Summit No. 27043, 2014-Ohio-3479, ¶ 15. We, therefore, conclude that this matter must be remanded to the trial court so that it can undertake further consideration of the motion to compel arbitration.

III.

{¶14} Town Money Saver's and TMS's assignment of error is sustained. The judgment of the Summit County Court of Common Pleas is reversed, and this matter is remanded for further consideration of the motion to compel arbitration.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

JENNIFER HENSAL
FOR THE COURT

SUTTON, P. J.
FLAGG LANZINGER, J.
CONCUR.

APPEARANCES:

ROY J. SCHECHTER, Attorney at Law, for Appellants.

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