

11-1646

IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

IN RE:)	
ROBERT J. FRONT,)	
Plaintiff,)	Civil Case No. 11-C-289(K)
v.)	
CREDIT ACCEPTANCE CORPORATION,)	
Defendant.)	
_____)	
BILLYE S. FRONT,)	
Plaintiff,)	Civil Case No. 11-C-290(K)
v.)	
CREDIT ACCEPTANCE CORPORATION,)	
Defendant.)	

OPINION ORDER

Two cases have been consolidated before the court for consideration. The cases arise out of the same transaction. The plaintiffs are husband and wife.

Robert J. and Billye S. Front (the "plaintiffs") commenced a civil action against Credit Acceptant Company (the "defendant") by filing a Complaint on or about April 14, 2011. Defendant later filed a Motion to Compel Arbitration and sought to stay the proceeding pending arbitration.

The plaintiffs contend that the arbitration agreement, contained within the contract for the sale of a vehicle (the "contract") is unconscionable, as the material terms of the contract have

been altered, and is therefore unenforceable. The plaintiff subsequently contends that the court should compel discovery in the underlying action. The plaintiffs complain that the arbitration agreement violates the West Virginia Consumer Credit and Protection Act.

The arbitration agreement contained within the contract provides in part:

You or we may elect to arbitrate under the rules and procedures of either the National Arbitration Forum or the American Arbitration Association; however, in the event of a conflict between these rules and procedures and the provisions of this Arbitration Clause, You and we agree that this Arbitration Clause governs for that specific conflict.

The arbitration agreement also provides a means for the plaintiffs to opt out of arbitration.

Subsequently, the American Arbitration Association announced that it will no longer conduct arbitration of consumer matters at the request of creditors.

The defendant contends that the arbitration agreement is valid and therefore, the case should be submitted to arbitration.

The court agrees that the arbitration agreement has been rendered void. The elimination of one of the two arbitration forums contained within the arbitration agreement constitutes a material change in the agreement. The court basis this decision on the analysis of the issue of unconscionability, the rights of citizens under the West Virginia Constitution, The West Virginia Consumer Credit Act, and the Federal Arbitration Act as fully discussed below.

Generally, "an agreement to arbitrate is valid, irrevocable, and enforceable as a matter of federal law." *Perry v. Thomas*, 482 U.S. 483, 492 (1987). Section 2 of the Federal Arbitration Act ("FAA") states a written arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

Although the FAA favors arbitration, “generally applicable contract defenses, such as...unconscionability, may be applied to invalidate arbitration agreements without contravening § 2 of the FAA.” *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *see also, Wince v. Easterbrook Cellular Corp.*, 681 F.Supp.2d 679, 683 (N.D.W.Va 2010) (same).

I. Unconscionability

“An analysis of whether a contract term is unconscionable necessarily involves an inquiry into the circumstances surrounding the execution of the contract and the fairness of the contract as a whole.” Syllabus Point 3, *Troy Mining Corp. v. Itmann Coal Co.*, 176 W.Va. 599, 346 S.E.2d 749 (1986).

“A determination of unconscionability must focus on the relative positions of the parties, the adequacy of the bargaining position, the meaningful alternatives available to the plaintiff, and ‘the existence of unfair terms in the contract.’” Syllabus Point 4, *Art’s Flower Shop, Inc. v. Chesapeake and Potomac Telephone Co. of West Virginia, Inc.*, 186 W.Va. 613, 413 S.E.2d 670 (1991).

Unconscionability is an equitable principle, and the determination of whether a contract or a provision therein is unconscionable should be made by the court.” Syllabus Point 1, *Troy Mining Corp. v. Itmann Coal Co.*, 176 W.Va. 599, 346 S.E.2d 749 (1986).

A contract term is unenforceable if it is both procedurally and substantively unconscionable. However, both need not be present to the same degree. Courts should apply a “sliding scale” in making this determination: the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that

the clause is unenforceable, and vice versa. Syllabus Point 20, *Brown v. Genesis Healthcare Corp.*, ___ S.E.2d ___, 2011 WL 2611327 (W. Va. June 29, 2011).

a. Procedural Unconscionability

Procedural unconscionability is concerned with inequities, improprieties, or unfairness in the bargaining process and formation of the contract. Procedural unconscionability involves a variety of inadequacies that results in the lack of a real and voluntary meeting of the minds of the parties, considering all the circumstances surrounding the transaction. These inadequacies include, but are not limited to, the age, literacy, or lack of sophistication of a party; hidden or unduly complex contract terms; the adhesive nature of the contract; and the manner and setting in which the contract was formed, including whether each party had a reasonable opportunity to understand the terms of the contract. Syllabus Point 17, *Brown v. Genesis Healthcare Corp.*, ___ S.E.2d ___, 2011 WL 2611327 (W. Va. June 29, 2011).

The court is apprised of the fact that the original contract is not procedurally unconscionable, in as much as it provided an adequate means for the plaintiffs to opt out of it; was adequately brought to the attention of the plaintiffs; and, provided two separate arbitration forums. However, the fact that one of the specific arbitration forums has been eliminated, materially changing the terms of the contract, causes the court to determine that there was no meeting of the minds to create the contract as it exists today.

b. Substantive Unconscionability

Substantive unconscionability involves unfairness in the contract itself and whether a contract term is one-sided and will have an overly harsh effect on the disadvantaged party. The factors to be weighed in assessing substantive unconscionability vary with the content of the

agreement. Generally, courts should consider the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and public policy concerns. Syllabus Point 19, *Brown v. Genesis Healthcare Corp.*, __ S.E.2d ___, 2011 WL 2611327 (W. Va. June 29, 2011).

In examining the matter of substantive unconscionability, the court finds that the elimination of an arbitration forum is a substantive change in the terms of the contract. Public policy favors a plaintiff having his day in court should the terms of a contract be materially altered after the execution of said contract.

II. Constitutional Rights under the Constitution of West Virginia

It is well established that parties have a fundamental constitutional right to use West Virginia's court system to seek justice. *See also*, Rule 38(a) of the *Rules of Civil Procedure*. *The West Virginia Constitution, Article III, § 17*, protects the right of the people to open access to the courts to seek justice, and states:

The courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay.

And Article III, § 13 of the Constitution, which preserves the right of the people to a jury trial over any controversy, states:

In suits at common law, where the value in controversy exceeds twenty dollars exclusive of interest and costs, the right of trial by jury, if required by either party, shall be preserved; and in such suit in a court of limited jurisdiction a jury shall consist of six persons. No fact tried by a jury shall be otherwise reexamined in any case than according to rule of court or law.

These constitutional protections were adopted to ensure impartial and open enforcement of our civil and criminal laws. Justice Starcher, writing for the Court, identified the founders' motivations for these constitutional provisions:

These constitutional rights—of open access to the courts to seek justice, and to trial by jury—are fundamental in the State of West Virginia. Our constitutional founders wanted the determinations of what is legally correct and just in our society, and the enforcement of our criminal and civil laws to occur in a system of open, accountable, affordable, publicly supported, and impartial tribunals—tribunals that involve, in the case of the jury, members of the general citizenry. These fundamental rights do not exist just for the benefit of individuals who have disputes, but *for the benefit of all of us*. The constitutional rights to open courts and jury trial serve to sustain the existence of a core social institution and mechanism upon which, it may be said without undue grandiosity, our way of life itself depends.

State ex rel. Dunlap v. Berger, 211 W.Va. 549, 560, 567 S.E.2d 265, 276 (2002).

The West Virginia Bill of Rights begins, in Article III, § 1 of the Constitution, with the statement that the *Constitution* protects “certain inherent rights” which people “cannot, by any compact, deprive or divest their posterity.” Still, we have recognized that the constitutionally-enshrined and fundamental rights to assert one’s claims for justice before a jury in the public court system may be the subject of a legally enforceable waiver. *See, e.g., Stephenson v. Ashburn*, 137 W.Va. 141, 144, 70 S. E.2d 585, 587 (1952). However, “Courts indulge every reasonable presumption against waiver of a fundamental constitutional right and will not presume acquiescence in the loss of such fundamental right.” Syllabus Point 2, *State ex rel. May v. Boles*, 149 W.Va. 155, 139 S.E.2d 177 (1964). *See also, Norfolk and Western R. Co. v. Sharp*, 183 W.Va. 283, 285, 395 S.E.2d 527, 527 (1990).

This court has been reluctant in the past, and continues to be reluctant today, to uphold arbitration agreements which essentially eliminate a party’s right to a trial. In this case, the court is especially hesitant to uphold such a contract where the terms of the original contract have been

altered as a result of the elimination of an arbitration forum. The plaintiffs enjoy the rights afforded them under the West Virginia Constitution, the right to file their claim and have their day in court.

III. West Virginia Consumer Credit Act

West Virginia Code §46A-1-107 prohibits West Virginia consumers from waiving any rights under the *West Virginia Consumer Credit and Protection Act* (the "Act"). The Act states:

Except as otherwise provided in this chapter, a consumer may not waive or agree to forgo rights or benefits under this chapter or under article two-a, chapter forty-six of this code.

The court is of the opinion that a consumer's of their rights afforded under the Act include the right to a jury trial. This right cannot be waived by an agreement, especially an agreement which no longer exists in its original form.

IV. Federal Arbitration Act

In 1925, the FAA was enacted and signed into law. When Congress enacted the FAA, its purpose was twofold: to reverse the longstanding judicial hostility toward arbitration agreements and to place arbitration agreements on equal footing with other contracts. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). The United States Supreme Court has therefore repeatedly concluded that the goal of Section 2 of the FAA is for an arbitration agreement to be treated by courts like any other contract. The FAA does not elevate arbitration clauses to a level of importance above other contract terms. "There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, *according to their terms*, of private agreements to arbitrate." *Volt Information Sciences*, 489 U.S. 468, 476 (*emphasis added*).

The terms of the arbitration agreement in question in this case have been materially altered. This material alteration of the contract terms renders the agreement void. The court refuses to elevate the arbitration clause above that of any other contract simply because it is an arbitration clause. The court will not overlook the basic values of contract law: consent, mutuality, unconscionability, disclosure, and fairness.

V. Conclusion

In conclusion, the court finds the arbitration agreement in question to be unconscionable and will enter a separate order that denies defendant's motion to stay the proceeding pending arbitration and grants the plaintiffs' motion to compel discovery.

WHEREFORE, it is hereby **ORDERED** that the Plaintiffs' Motion to Compel Discovery is **GRANTED** and the Defendant's Motion to Compel Arbitration is **DENIED**.

The court shall reserve any objections and exceptions by either party to this ruling for purposes of appeal to the West Virginia Supreme Court of Appeals. This is a final order. The Circuit Clerk is directed to send attested copies of this order to representatives of each of the parties, as addressed below:

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ENTER this, 20th day of October, 2011.

The foregoing is a true copy of an order entered in this office on the 20th day of Oct, 2011.
PAUL H. FLANAGAN, Circuit Clerk of Raleigh County, West Virginia
By: ab
Deputy

P. A. Kirkpatrick III
JUDGE