

12-0545

IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

OCIE SHREWSBURY,

Plaintiff,

v.

Civil Action No.: 11-C-391-H
Honorable John A. Hutchison

CREDIT ACCEPTANCE CORPORATION,

Defendant.

**ORDER DENYING DEFENDANT'S MOTION TO DISMISS THIS
PROCEEDING AND COMPEL ARBITRATION OR, IN THE ALTERNATIVE,
TO STAY THIS PROCEEDING PENDING ARBITRATION**

This matter came before the Court on the 24th day of October, 2011, on the Defendant's Motion to Dismiss this Proceeding and Compel Arbitration or, in the Alternative, to Stay this Proceeding Pending Arbitration. The Plaintiff appeared by counsel, Ralph Young and Steve Broadwater; and the Defendant appeared by counsel, Patrick Barry and Nicholas Mooney.

The Court has considered the motion and responsive documents, reviewed the record, heard the arguments of counsel, and considered pertinent legal authorities. As a result of these deliberations, the Court has concluded that the arbitration agreement is not enforceable in this case, and the Defendant's motion should be denied.

FINDINGS OF FACT

1. The Plaintiff commenced this action against the Defendant on or about May 17, 2011. The Defendant filed the present motion on June 27, 2011.

2. The Defendant contends that the dispute should be submitted to arbitration pursuant to a valid, binding arbitration agreement contained in the parties' contract for the sale of a vehicle. The Defendant asks the Court to dismiss the matter and compel arbitration, or in the alternative, to stay the proceeding pending arbitration.

3. The Plaintiff argues that the arbitration agreement is unconscionable, as the material terms of the contract have been altered, and is therefore unenforceable. The Plaintiff asks the Court to deny the motion and allow the matter to proceed in litigation.

4. Upon consideration of the motion, the supplemental briefs, the arguments of counsel, and pertinent legal authorities, the Court believes that the terms of the arbitration agreement have been materially altered, and the agreement is rendered void. Therefore, pursuant to West Virginia law, the arbitration agreement in this case is not enforceable, and the motion should be denied.

CONCLUSIONS OF LAW

1. "When a trial court is required to rule upon a motion to compel arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-307 (2006), the authority of the trial court is limited to determining the threshold issues of (1) whether a valid arbitration agreement exists between the parties; and (2) whether the claims averred by the plaintiff fall within the substantive scope of that arbitration agreement." Syllabus Point 2, *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W.Va. 250, 692 S.E.2d 293 (2010).

2. "Under the Federal Arbitration Act, 9 U.S.C. § 2, a written provision to settle by arbitration a controversy arising out of a contract that evidences a transaction affecting interstate commerce is valid, irrevocable, and enforceable, unless the provision

is found to be invalid, revocable or unenforceable upon a ground that exists at law or in equity for the revocation of any contract.” Syllabus Point 6, *Brown v. Genesis Healthcare Corp.*, --- S.E.2d ----, 2011 WL 2611327 (W.Va. June 29, 2011). Generally applicable contract defenses, including unconscionability, may be applied to invalidate an arbitration agreement. *Id.* at Syllabus Point 9.¹

3. “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). In addition, the determination “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).

4. “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).

¹ The Court recognizes that the ruling of the West Virginia Supreme Court of Appeals in *Brown v. Genesis Healthcare Corp.* was recently vacated and remanded by the Supreme Court of the United States in *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201 (2012). However, the grounds upon which *Brown v. Genesis Healthcare Corp.* was vacated are not the grounds upon which this Court relies in this matter.

5. “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).

6. The Court recognizes that the contract in this matter is not procedurally unconscionable, in that it provided an adequate means for the Plaintiff to opt out. Further, the arbitration agreement was clearly brought to the attention of the Plaintiff in the contract, and provided for arbitration by two separate forums, NAF and AAA. However, neither of the specified forums currently accepts creditor arbitration requests. Because the specific arbitration forums have been eliminated, there has been a material change in the terms of the contract. The Court has therefore determined that there was no meeting of the minds to create the contract as it exists today, and the arbitration agreement is unenforceable.

7. “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).

8. In examining substantive unconscionability, the Court finds that the elimination of the arbitration forums is a material 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 the contract. Further, this Court is reluctant to uphold an arbitration agreement which essentially eliminates a party’s constitutional right to file suit, especially when the agreement no longer exists in its original form. Although the right to assert one’s claim in the court system may be subject to a legally enforceable waiver, “[c]ourts 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). For these reasons, the Court finds that the arbitration agreement in this case is unenforceable.

9. This Court has determined that the arbitration provision in question is unconscionable pursuant to the West Virginia Supreme Court’s holding in *Brown v. Genesis Healthcare Corp.* The Court therefore finds this term of the contract to be unenforceable; accordingly, the Motion to Dismiss this Proceeding and Compel Arbitration or, in the Alternative, to Stay this Proceeding Pending Arbitration must be denied, and litigation of the case may proceed.

It is therefore **ORDERED** and **ADJUDGED** as follows:

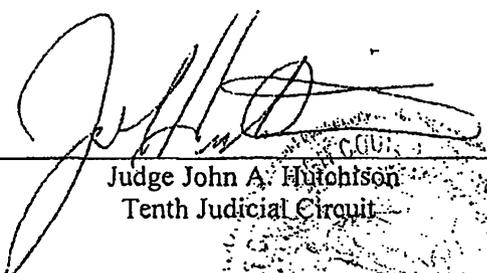
1. That Defendant Credit Acceptance Corporation's Motion to Dismiss this Proceeding and Compel Arbitration or, in the Alternative, to Stay this Proceeding Pending Arbitration is **DENIED**.

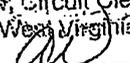
2. That the Circuit Clerk provide certified copies of this Order to:

Ralph C. Young, Esq.
Christopher B. Frost, Esq.
Steven R. Broadwater, Jr., Esq.
Hamilton, Burgess, Young & Pollard, PLLC
P.O. Box 959
Fayetteville, WV 25840

Bruce M. Jacobs, Esq.
Nicholas P. Mooney, Esq.
Patrick R. Barry, Esq.
Spilman Thomas & Battle, PLLC
300 Kanawha Boulevard, East (ZIP 25301)
P.O. Box 273
Charleston, WV 25321-0273

Entered on the 29th day of March, 2012.


Judge John A. Hutchinson
Tenth Judicial Circuit

The foregoing is a true copy of an order entered in this office on the 29 day of March, 2012
PAUL H. FLANAGAN, Circuit Clerk of Raleigh County, West Virginia
By: 
Deputy