IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

JANICE FULLER, PLAINTIFF,

V. CIVIL CASE NO. ~~16-C-375~~ 17-C-147-MW

CERTEGY CHECK SERVICES, INC., and COMPLETE PAYMENT RECORVERY SERVICES INC., DEFENDANTS.

ORDER DENYING DEFENDANT'S MOTION TO COMPEL ARBITRATION

I. Brief Conclusion

This matter came before the Court on October 2, 2017, on Defendant's *Motion to Compel Arbitration.* There appearing were Steven R. Broadwater, Esq., for Plaintiff Janice Fuller; and John Lynch, Esq., for Defendant Anita Ellis. Defendant argues that Plaintiff agreed to arbitrate any dispute that arose by signing a "terminal contract." [1] After careful consideration of the arguments of counsel, the Court file, pertinent legal authorities, and for reasons discussed more fully hereinafter, Defendant's *Motion* is DENIED.

II. Background

Plaintiff visited a hotel in Las Vegas Nevada, and paid for the hotel with credit card convenience checks to take advantage of a 0.0% interest offer from her credit card. Her credit card processed the checks and added the charge to Plaintiff's monthly statement. Plaintiff's credit card processed these payments and her credit card convenience checks were honored by her bank. However, she began receiving collection letters and calls from Defendant Complete Payment Recovery Solutions ("CPRS') on behalf of Defendant Certegy.

1 This terminal contract is one were the terms are on an electronic pin pad or card reader and one party signs electronically.

Defendant claims that Plaintiff was presented with contract terms and expressly agreed to them by singing an electronic credit card reader. Further, when Plaintiff reviewed the documents attached to Defendant' motion she learned that someone had place her information of the paper documents and it was not in her handwriting. She further argues that she did not know of the alleged arbitration agreement and she merely used this service as a convenience. She claims that had she been shown the contract terms she would not have agreed to use the service. Finally, she argues that she was billed for the charges and paid them in full.

III. Standard of Review

When a party moves to compel arbitration, or to dismiss on the basis of a governing arbitration agreement, the Court first must "determine whether the parties agreed to arbitrate that dispute." *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 626 (1985). The moving party must show:

> (1) the existence of a dispute between the parties,
>
> (2) a written agreement that includes an arbitration provision which purports to cover the dispute,
>
> (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and
>
> (4) the failure, neglect or refusal of the [plaintiff] to arbitrate the dispute.

Adkins v. Labor Ready, Inc., 303 F.3d 496, 500–01 (4th Cir. 2002) (quoting *Whiteside v. Teltech Corp.*, 940 F.2d 99, 102 (4th Cir. 1991)). While the Court applies the "federal substantive law of arbitrability," *id.* (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S. 1, 24 (1983)), ***it applies "state law governing contract formation" to determine "[w]hether a party agreed to arbitrate a particular dispute,"*** *Adkins*, 303 F.3d at 501. *Kabba v. Ctr.*, No. PWG-17-211, 2017 WL 1508829, at *2 (D. Md. Apr. 27, 2017).

The key issue in this case, is whether the parties agreed to arbitrate this particular dispute. Further, when a trial court is required to rule upon a motion to compel arbitration pursuant to the Federal Arbitration Act, 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. 9 U.S.C.A §§ 1–307.15 *State ex rel. TD Ameritrade, Inc. v. Kaufman*, 225 W. Va. 250, 692 S.E.2d 293 (2010).

IV. Existence of a Contract

To determine the threshold issue, West Virginia State law involving contract formation applies. The Plaintiff argues that there is no contract formed between her and Defendant because she was merely told to sign an electronic card reader in a rushed environment. Further, the actual contract terms are unconscionable. The doctrine of unconscionability means that, because of an overall and gross imbalance, one-sidedness or lop-sidedness in a contract, a court may be justified in refusing to enforce the contract as written. The concept of unconscionability must be applied in a flexible manner, taking into consideration all of the facts and circumstances of a particular case. Unconscionability has generally been recognized to include 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.

Undertaking 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. 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. The particular facts involved in each case are of utmost importance since certain conduct, contracts or contractual provisions may be unconscionable in some situations but not in others.

Unconscionability is an equitable principle, and the determination of whether a contract or a provision therein is unconscionable should be made by the court. The court is charged with resolving the question of whether a contract provision was ***bargained for and valid***. If a court, as a matter of law, finds a contract or any clause of a contract to be unconscionable, the court may refuse to enforce the contract, enforce the remainder of the contract without the unconscionable clause, or limit the application of any unconscionable clause to avoid any unconscionable result.

Under West Virginia law, unconscionability is analyzed in terms of two component parts: procedural unconscionability and substantive unconscionability. Procedural and substantive unconscionability often occur together, and the line between the two concepts is often blurred. For instance, overwhelming bargaining strength against an inexperienced party (procedural unconscionability) may result in an adhesive form contract with terms that are commercially unreasonable (substantive unconscionability). 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.

A. *Procedural Unconscionability*

The guidelines for determining procedural unconscionability are set forth in Syllabus Point 17 of *Brown I:*

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.

Considering factors such as these, courts are more likely to find unconscionability in consumer transactions and employment agreements than in contracts arising in purely commercial settings involving experienced parties. Procedural unconscionability often begins with a contract of adhesion.

A contract of adhesion is one drafted and imposed by a party of superior strength that leaves the subscribing party little or no opportunity to alter the substantive terms, and only the opportunity to adhere to the contract or reject it. A contract of adhesion should receive greater scrutiny than a contract with bargained-for terms to determine if it imposes terms that are oppressive, unconscionable or beyond the reasonable expectations of an ordinary person.

As the Court recognized in *State ex rel. Dunlap v. Berger,* "[f]inding that there is an adhesion contract is the beginning point for analysis, not the end of it; what courts aim at doing is distinguishing good adhesion contracts which should be enforced from bad adhesion contracts which should not."

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.

Substantive unconscionability may manifest itself in the form of an agreement requiring arbitration only for the claims of the weaker party but a choice of forums for the claims of the stronger party. Some courts suggest that mutuality of obligation is the locus around which substantive unconscionability analysis revolves. Agreements to arbitrate must contain at least 'a modicum of bilaterality' to avoid unconscionability.

The Court recently noted in *State ex rel. Richmond American Homes v. Sanders* that when "an agreement to arbitrate imposes high costs that might deter a litigant from pursuing a claim, a trial court may consider those costs in assessing whether the agreement is substantively unconscionable." As even the United States Supreme Court has recognized, "[t]he existence of large arbitration costs could preclude a litigant ... from effectively vindicating her ... rights in the arbitral forum.'"'[I]t is not only the costs imposed on the claimant but the risk that the claimant may have to bear substantial costs that deters the exercise of the constitutional right of due process." In *State ex rel. Dunlap v. Berger*, we held that a trial court could consider the effect of those high costs in its substantive unconscionability analysis:

Provisions in a contract of adhesion that if applied would impose unreasonably burdensome costs upon ***or would have a substantial deterrent effect upon a person seeking to***

enforce and vindicate rights and protections or to obtain statutory or common-law relief and remedies that are afforded by or arise under state law that exists for the benefit and protection of the public, are unconscionable; unless the court determines that exceptional circumstances exist that make the provisions conscionable. In any challenge to such a provision, the responsibility of showing the costs likely to be imposed by the application of such a provision is upon the party challenging the provision; the issue of whether the costs would impose an unconscionably impermissible burden or deterrent is for the court.

The Court recognized in *Brown I* that "[n]o single, precise definition of substantive unconscionability can be articulated" because "the factors to be considered vary with the content of the agreement at issue." "Accordingly, courts should assess whether a contract provision is substantively unconscionable on a case-by-case basis." *Brown v. Genesis Healthcare Corp.*, 229 W. Va. 382, 391–94, 729 S.E.2d 217, 226–29 (2012).

V. Discussion

There was no evidence presented that shows the Plaintiff agreed to the terms of this contract. When looking at some of the specific terms, the contract has many sophisticated terms, such as:

- Wavier of the benefit of the fee shifting provisions of the WVCCPA due to the election of Florida law;
- the required selection of Commercial Arbitration Ruels when the dispute is clearly a consumer dispute;
- the unnecessary designation of Commercial Arbitration Rules when consumer rules exist for this type of claim;

- the class-wide ban on arbitration arising in an adhesive contract, even if class members have identical claims.

There was no real choice or bargaining on the part of the Plaintiff. Instead, the Plaintiff argues that she signed this agreement in a rushed environment without an opportunity to review any terms. This certainly is not a "bargained for exchange." Further, Plaintiff is entitled to her "day in court" and should not be forced to arbitrate an issue that has such an impact on her livelihood. Because the law of contract formation in West Virginia is what governs, the Court FINDS and CONLCUDES that there was no agreement by the Plaintiff to arbitrate.

VI. Conclusion

1. Defendant's *Motion to Compel Arbitration is* DENIED.
2. The Clerk is directed to forward copies of this Order to all Counsel of Record.

Entered this the 4th day of October, 2017.

Mark Wills

Mark Wills, Judge 9th judicial circuit