IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

HOBBY LOBBY STORES, INC.,

Appellant,

v. Case No. 5D18-3809

ALAN COLE,

Appellee.

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Opinion filed January 3, 2020

Nonfinal Appeal from the Circuit Court
for Marion County,
Edward L. Scott, Judge.

Howard S. Marks and Sheena A. Thakrar, of Burr & Forman, LLP, Orlando, for Appellant.

James P. Tarquin and Mark Dillman, of James P. Tarquin, P.A., Ocala, for Appellee.

TRAVER, J.

Hobby Lobby Stores, Inc. ("Hobby Lobby") appeals a nonfinal order denying its motion to compel arbitration in a wrongful termination lawsuit filed by Alan Cole, a former employee. Hobby Lobby based its motion on a Mutual Arbitration Agreement ("the Agreement") the parties executed as a condition of his employment. The trial court found the Agreement unconscionable and denied the motion. We have jurisdiction. Fla. R.

App. P. 9.130(a)(3)(C)(iv). Because we conclude that the Agreement was binding, enforceable, and not unconscionable, we reverse.

Mr. Cole applied for and obtained a cashier position with Hobby Lobby's Ocala store in 2015. He allegedly sustained a workplace injury in March 2018, for which he sought and received workers' compensation benefits. Mr. Cole suggests that Hobby Lobby then subjected him to antagonistic conduct, culminating in his discharge in May 2018. Mr. Cole then sued Hobby Lobby for improperly discharging him in retaliation for his workers' compensation claim. *See* § 440.205, Fla. Stat. (2018). Hobby Lobby moved to compel arbitration pursuant to the Agreement.

The Agreement is a two-page, single-spaced document Hobby Lobby and Mr. Cole signed on July 27, 2015. The Agreement conditioned Mr. Cole's employment on his acceptance of its terms. The parties agreed that any employment-related dispute Mr. Cole had with Hobby Lobby, including "[d]isputes involving interference and/or retaliation relating to workers' compensation," would be submitted to and settled by final and binding arbitration. Mr. Cole could select from two sets of arbitration rules, and Hobby Lobby agreed to pay all arbitration fees and costs. The parties acknowledged they had each read the agreement, gave up any right to sue one another, waived any right to a jury trial, and "knowingly and voluntarily consent[ed] to all terms and conditions set forth in this Agreement."

The trial court denied Hobby Lobby's motion, concluding the Agreement was an unconscionable adhesion contract. It relied on Mr. Cole's affidavit, submitted in opposition to the motion to compel. Mr. Cole averred he had a high school education, and he did not know what an arbitrator or an arbitration was. He contended nobody

explained he was waiving his right to a jury trial, offered him an opportunity to consult with counsel, or provided him with arbitration rules. He believed he had no choice but to sign the Agreement to get and keep his job.

A trial court's ruling on a motion to compel arbitration is reviewed de novo. *Krol v. FCA US, LLC*, 273 So. 3d 198, 200 (Fla. 5th DCA 2019). We defer to the trial court's factual findings, provided they are supported by competent, substantial evidence. *Reunion W. Dev. Partners, LLLP v. Guimaraes*, 221 So. 3d 1278, 1280 (Fla. 5th DCA 2017). Courts generally favor arbitration provisions and try to resolve any ambiguity in favor of arbitration. *Jackson v. Shakespeare Found., Inc.*, 108 So. 3d 587, 593 (Fla. 2013).

When evaluating whether to compel arbitration pursuant to written agreement, a court must consider: "(1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration was waived." *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636 (Fla. 1999) (citing *Terminix Int'l Co. v. Ponzio*, 693 So. 2d 104, 106 (Fla. 5th DCA 1997)). Here, there is no dispute that Hobby Lobby met all three prongs of this test. The inquiry does not end here because general contract defenses also apply. *See Glob. Travel Mktg., Inc. v. Shea*, 908 So. 2d 392, 398 (Fla. 2005) (stating that the rights of access to courts and trial by jury may be contractually relinquished subject to general contract defenses, including unconscionability). In this case, the trial court found the Agreement unconscionable.

To find an arbitration agreement unconscionable, a court must conclude it is both procedurally and substantively unconscionable. *Basulto v. Hialeah Auto.*, 141 So. 3d 1145, 1158–59 (Fla. 2014). Although both types of unconscionability are necessary to

invalidate an arbitration agreement, they need not be equally present, and courts should evaluate them independently. *Id*. at 1161. A sliding scale approach applies, meaning that the more procedurally oppressive the contract, the less evidence of substantive unconscionability is required, and vice versa. *Id.* at 1159–60. The party seeking to avoid arbitration bears the burden to establish unconscionability. *Estate of Perez v. Life Care Ctrs. of Am., Inc.*, 23 So. 3d 741, 742 (Fla. 5th DCA 2009).

Procedural unconscionability relates to the manner in which a contract is entered, and courts determine whether it exists based on a totality of the circumstances. *Fla. Holdings III, LLC v. Duerst ex rel. Duerst*, 198 So. 3d 834, 839 (Fla. 2d DCA 2016) (citing *SA-PG Sun City Ctr., LLC v. Kennedy*, 79 So. 3d 916, 921 (Fla. 2d DCA 2012)). The central question in determining whether a contract is procedurally unconscionable is "whether the complaining party lacked a meaningful choice when entering into the contract." *Basulto*, 141 So. 3d at 1157 n.3 (citing *Kohl v. Bay Colony Club Condo., Inc.*, 398 So. 2d 865, 868–69 (Fla. 4th DCA 1981)). In answering this question, courts consider: "(1) the manner in which the contract was entered into; (2) the relative bargaining power of the parties and whether the complaining party had a meaningful choice at the time the contract was entered into; (3) whether the terms were merely presented on a 'take-it-or-leave-it' basis; and (4) the complaining party's ability and opportunity to understand the disputed terms of the contract." *Id*. (quoting *Pendergast v. Sprint Nextel Corp.*, 592 F.3d 1119, 1135 (11th Cir. 2010)). Courts should also consider whether each party, given their education, was given a reasonable opportunity to understand an arbitration agreement's terms, or whether important terms were "hidden in

a maze of fine print and minimized." *Id*. at 1160 (quoting *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965)).

In predicating its finding of procedural unconscionability on the Agreement's take-it-or-leave-it nature, the trial court relied on California law. *See Martinez v. Master Prot. Corp.*, 12 Cal. Rptr. 3d 663, 669 (Cal. Ct. App. 2004) (holding that "[a]n arbitration agreement that is an essential part of a 'take it or leave it' employment condition, without more, is procedurally unconscionable"). In Florida, however, the take-it-or-leave-it nature of arbitration agreements is not dispositive. *VoiceStream Wireless Corp. v. U.S. Commc'ns, Inc.*, 912 So. 2d 34, 40 (Fla. 4th DCA 2005) (stating that "the presence of an adhesion contract alone does not require a finding of procedural unconscionability"). Instead, courts should explore the circumstances surrounding the execution of an arbitration agreement before concluding it is procedurally unconscionable. *See Kendall Imps., LLC v. Diaz*, 215 So. 3d 95, 100 (Fla. 3d DCA 2017).

Here, there is no evidence that Mr. Cole could not read the Agreement or that Hobby Lobby pressured, rushed, or coerced him into signing it. Mr. Cole does not contend that he asked any questions about the Agreement, nor that he expressed any confusion about any of its terms. He makes no allegation that he lacked a full and fair opportunity to inquire into the Agreement's terms or to enlist help if confused. Meanwhile, the Agreement's operative terms are not hidden, minimized, or buried in fine print. There are no allegations that Hobby Lobby made false representations or engaged in "deceptive sales practices" in order to induce Mr. Cole's signature. *See Walker-Thomas*, 350 F.2d at 449. Based on the totality of these circumstances, the trial court erred in finding the Agreement procedurally unconscionable.

Similarly, the record does not support the trial court's finding that the Agreement is substantively unconscionable. Substantive unconscionability focuses on the arbitration agreement itself. *Powertel, Inc. v. Bexley*, 743 So. 2d 570, 574 (Fla. 1st DCA 1999) (citing *Kohl*, 398 So. 2d at 868)). It concerns whether the terms of the contract are so unreasonable and unfair, courts should withhold their enforcement. *Basulto*, 141 So. 3d at 1158 n.4 (quoting *Walker-Thomas*, 350 F.2d at 449–50); *Tropical Ford, Inc. v. Major*, 882 So. 2d 476, 479 (Fla. 5th DCA 2004). For example, an arbitration agreement that deprives a claimant of an effective way to vindicate a statutory cause of action in arbitration is substantively unconscionable. *AMS Staff Leasing, Inc. v. Taylor*, 158 So. 3d 682, 688 (Fla. 4th DCA 2015) (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991)).

Here, the trial court based its finding of substantive unconscionability on four grounds: (1) the Agreement required Mr. Cole to forfeit his right to a jury trial; (2) the Agreement truncated the statute of limitations for tort claims to one year; (3) the Agreement did not define which arbitration rules apply; and (4) the Agreement required Mr. Cole to pay Hobby Lobby's attorneys' fees if he contested the Agreement in court. Mr. Cole raised only the first ground.

All arbitration agreements waive the parties' right to a jury trial as a means of dispute resolution. *Fi-Evergreen Woods, LLC v. Estate of Robinson*, 172 So. 3d 493, 497 (Fla. 5th DCA 2015). Accordingly, this does not provide a basis for a finding of substantive unconscionability. The Agreement's plain language contravenes the remaining findings. It requires a claimant to file suit "within the limitations period established by the applicable statute." The one-year provision only applies if a claim lacks a statutory limitations period.

The Agreement also allows the claimant to select between the American Arbitration Association's National Rules for the Resolution of Employment Disputes or the Institute for Christian Conciliation's Rules of Procedure for Christian Conciliation. Finally, the Agreement does not require Mr. Cole to pay the entirety of Hobby Lobby's fees if he contests its provisions; rather, Hobby Lobby may only recover costs, expenses, and attorneys' fees incurred in compelling arbitration. Ultimately, there is no basis to conclude the Agreement is substantively unconscionable.

We conclude the Agreement is binding, enforceable, and not unconscionable. Accordingly, we reverse the order on appeal and remand with directions to grant the Appellant's motion to compel arbitration.

REVERSED and REMANDED with DIRECTIONS.

EISNAUGLE and HARRIS, JJ., concur.