RENDERED: JULY 1, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000063-MR

RAHMAN AND MILANDO ABDULLAH,
AS PARENTS AND NATURAL GUARDIANS
OF ALIILYLAH ABDULLAH, RAJIAH
ABDULLAH, RAHKIM ABDULLAH, ASAAD
ABDULLAH, AND RAHMAN ABDULLAH
AND MILANDO ABDULLAH, INDIVIDUALLY — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE FREDERIC J. COWAN, JUDGE
ACTION NO. 14-CI-04697

SEI AARON'S, INC. D/B/A AARON'S AND
AARON'S, INC. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, JONES, J. LAMBERT, JUDGES.

DIXON, JUDGE: Appellants, Rahman and Milando Abdullah, as parents and natural guardians of Aliilylah Abdullah, Rajiah Abdullah, Rahkim Abdullah,

Asaad Abdullah, and Rahman Abdullah and Milando Abdullah, individually, appeal from an order of the Jefferson Circuit Court granting Appellees' Sei Aaron's, Inc. d/b/a Aaron's and Aaron's, Inc. motion to dismiss the Abdullahs' complaint and compel arbitration in the matter. Finding no error, we affirm.

On May 1, 2014, Milando Abdullah leased various pieces of furniture from an Aaron's retail store in Louisville, Kentucky. Milando executed a three-page lease agreement, including Aaron's mandatory arbitration agreement, which provided in relevant part:

> DISPUTES SUBJECT TO INDIVDUAL ARBITRATION/CLASS ACTION WAIVER
>
> YOU AND WE AGREE THAT ANY AND ALL DISPUTES ARISING OUT OF OR RELATING IN ANY WAY TO YOUR AGREEMENT(S) WITH SEI/AARONS, INC D/B/A AARON'S ("Aaron's" or "we"), THE PRODUCTS OR SERVICES PROVIDED TO YOU BY AARON'S, OR THE AMOUNTS PAID OR OWED TO YOU BY AARON'S ("Disputes") SHALL BE RESOLVED EXCLUSIVELY IN BINDING ARBITRATION RATHER THAN LITGATION IN COURT.

Further, the arbitration provision expressly addressed the scope of its terms and its mutually binding prohibition against litigation, other than in small claims court:

> This agreement to arbitrate applies to all Disputes, whether based in contract, tort, statute, or any other legal or equitable theory. Notwithstanding this Arbitration Agreement, you or Aaron's may bring disputes in an appropriate small claims court so long as the relief requested falls within the jurisdiction of the small claims court, but neither you nor Aaron's may bring claims in any other court. You and we agree that any questions

> about the scope or enforceability of this Arbitration Agreement will be decided by a Court, not the arbitrator.

The Abdullahs claim that shortly after the furniture was delivered to their residence, they discovered that it was infested with bed bugs and that the family suffered severe bites while sleeping.

On September 10, 2014, the Abdullahs filed a negligence action in the Jefferson Circuit Court against Aaron's seeking damages for physical and emotional injuries, as well as economic losses. On September 30, 2014, Aaron's filed a motion to compel arbitration and a motion to dismiss the Abdullahs' complaint. The Abdullahs thereafter filed a response arguing that the arbitration agreement was unconstitutional, that Milando Abdullah did not knowingly and voluntarily sign the agreement, that the agreement was unenforceable due to lack of consideration, and that the agreement was not binding on all family members because Milando was the only signatory.

By order entered December 18, 2014, the trial court granted Aaron's motions. Therein, the trial court first noted that arbitration is constitutional on both the federal and state level. Further, the trial court concluded,

> [T]he "settled law in Kentucky" is "that one who signs a contract is presumed to know its contents." *Hathaway v. Eckerle*, 336 S.W.3d 83, 88 (Ky. 2011). Further, a clause requiring both parties to submit equally to arbitration constitutes adequate consideration for the agreement to be binding on both parties and there is nothing unconscionable about such a clause as long as it is "stated in clear and concise language" which is not "hidden or obscure." *Energy Home, Division of Southern Energy [Homes], Inc. v. Peay*, 406 S.W.3d 828,

> 835 (Ky. 2013). The arbitration agreement in the instant case is a separate document that has a bold heading printed at the top of it that is titled **"AARON'S MANDATORY ARBITRATION AGREEMENT."** The agreement is equally binding on both parties and is written in clear and concise language. The agreement, then, is supported by consideration and is not unconscionable. Finally, since all of the plaintiffs received the benefits of the contract, it is binding on all of them even though only Mr. Abdullah, the father of the family, signed it.[1]

The Abdullahs thereafter appealed to this Court as a matter of right.

Kentucky law generally favors the enforcement of arbitration agreements. *Mt. Holly Nursing Center v. Crowdus*, 281 S.W.3d 809, 813 (Ky. App. 2008). Under both the Federal Arbitration Act (FAA) and the Kentucky Uniform Arbitration Act (KUAA), a party seeking to compel arbitration has the initial burden of establishing the existence of a valid agreement to arbitrate. *Ping v. Beverley Enterprises, Inc.,* 376 S.W.3d 581, 590 (Ky. 2012); *Louisville Peterbilt, Inc. v. Cox*, 132 S.W.3d 850, 857 (Ky. 2004). A party meets that prima facie burden by providing copies of a written and signed agreement to arbitrate. *MCH Kenworth-Knoxville/Nashville v. M & H Trucking, LLC*, 392 S.W.3d 903, 906 (2013). Unless the parties clearly and unmistakably manifest a contrary intent, that initial showing is addressed to the court, not the arbitrator, and the existence of the agreement depends on state law rules of contract formation. *Id.*; *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630-31, 129 S.Ct. 1896, 1908, 173 L.Ed.2d 832 (2009). An appellate court reviews the trial court's application of those rules *de*

[1] Milando Abdullah is actually the mother of the family.

novo, although the trial court's factual findings, if any, will be disturbed only if clearly erroneous. *Ping*, 376 S.W.3d at 590; *North Fork Collieries, LLC v. Hall*, 322 S.W.3d 98, 102 (Ky. 2010).

The Abdullahs first argue that the arbitration agreement is unenforceable under Kentucky contract law. Specifically, they contend as they did in the trial court that the agreement lacks consideration; that it is both procedurally and substantively unconscionable; and in fact, that it constitutes a contract of adhesion. We find these arguments to be without merit.

Under both the FAA and the KUAA, agreements to submit controversies to arbitration may be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." 9 United States Code § 2; Kentucky Revised Statutes (KRS) 417.050. Lack of consideration is one such ground. However, under Kentucky law "an arbitration clause requiring both parties to submit equally to arbitration constitutes adequate consideration." *Peay*, 406 S.W.3d at 835 (citation omitted). We find no merit in the Abdullahs' bald assertion that the arbitration process favors corporate defendants and a mutual obligation to bring claims in such a one-sided forum cannot constitute consideration. Under the arbitration agreement at issue herein, both the Abdullahs and Aaron's are required to submit any claims to the American Arbitration Association. Accordingly, the trial court properly found that such mutuality of obligation constitutes adequate consideration.

Unconscionability is another ground upon which any contract may be revoked. *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 342, 131 S.Ct. 1740, 1747, 179 L.Ed.2d 742 (2011); *Schnuerle v. Insight Communications Co*., *L.P*., 376 S.W.3d 561, 575 (Ky. 2011); *Conseco Financial Servicing Corp. v. Wilder*, 47 S.W.3d 335, 341 (Ky. App. 2001). In *Schnuerle,* our Supreme Court observed that "[t]he doctrine [of unconscionability] is used by the courts to police the excesses of certain parties who abuse their right to contract freely. It is directed against one-sided, oppressive and unfairly surprising contracts, and not against the consequences *per se* of uneven bargaining power or even a simple old-fashioned bad bargain." 376 S.W.3d at 575.

Unconscionability may be procedural or substantive. Procedural unconscionability relates to the "process by which an agreement is reached and the form of an agreement, including the use therein of fine print and convoluted or unclear language . . ." *Conseco*, 47 S.W.3d at 342, n. 22 (*Quoting Harris v. Green Tree Financial Corp.*, 183 F.3d 173, 181 (3rd Cir. 1999)). Substantive unconscionability, on the other hand, "refers to contractual terms that are unreasonably or grossly favorable to one side and to which the disfavored party does not assent." *Id*. In reviewing a contract for substantive unconscionability, consideration is given to "the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and similar public policy concerns." *Schnuerle,* 376 S.W.3d at 577 (*Quoting Jenkins v.*

First American Cash Advance of Georgia, LLC., 400 F.3d 868, 876 (11th Cir. 2005)).

The Abdullahs argue that Aaron's arbitration agreement is procedurally and substantively unconscionable because Aaron's used the disparate bargaining power of the parties and shifted the risk to the Abdullahs, consumers who have little education or experience with the arbitration process. The Abdullahs contend that Aaron's is much more likely to prevail in arbitration because there is strong evidence that arbitrators are biased towards corporate defendants who may be repeat customers. The Abdullahs point out that Aaron's target market is low-income individuals who cannot afford to buy furniture and thus are forced to unknowingly agree to pay potentially thousands of dollars in fees to arbitrators in order to lease a few pieces of furniture.

We find no procedural unconscionability in the arbitration provisions that accompanied the lease agreement herein. As the trial court concluded, the arbitration agreement was stated in clear and concise language, and did not contain any terms that would unfairly surprise the Abdullahs. The agreement clearly explains that arbitration means giving up the right to resolve disputes through a jury trial. We believe the language used in the arbitration agreement was understandable by an adult of ordinary experience and intelligence. Furthermore, not only do the Abdullahs fail to present any evidence to support their claim of bias, but Kentucky courts have specifically held that a plaintiff's presumption that arbitration will not afford an adequate opportunity to vindicate his or her

substantive claims "is not a proper basis for refusing enforcement of an arbitration clause." *Conseco*, 47 S.W.3d at 344.

We are likewise unable to conclude that the arbitration agreement is substantively unconscionable. The obligation to arbitrate and the waiver of jury trial rights are mutually binding on all parties. In other words, Aaron's is clearly subject to the same limitation of its right to litigate in court as the Abdullahs. Moreover, the Abdullahs' claim that the arbitration agreement works a financial hardship and will require them to pay thousands of dollars is simply false and unsupported by the plain language of the agreement or by arbitration procedures.

The Abdullahs next argue that the trial court erred in ruling on the validity of the arbitration agreement prior to any discovery being conducted or a hearing held. The Abdullahs contend that discovery is warranted to ascertain the unconscionability of the agreement because questions remain as to whether an Aaron's employee explained the agreement to Milando or had the authority to negotiate the agreement, as well as whether Milando would have been permitted to lease the furniture without signing the arbitration agreement. We conclude that not only is this argument without merit, but that the Abdullahs have waived such on appeal.

The record reveals that, contrary to the Abdullahs' claim, a hearing on Aaron's motion to dismiss was held and the parties engaged in limited oral argument as to the issues therein. Had the Abdullahs believed additional argument

or discovery was warranted, it was incumbent upon them to raise the issue before the trial court before the matter was submitted for final adjudication.

Furthermore, Kentucky Rules of Civil Procedure (CR) 76.03(4)(h) provides that within twenty days of filing a notice of appeal, an appellant must file a prehearing statement setting out a "brief statement of the facts and issues proposed to be raised on appeal, including jurisdictional challenges[.]" CR 76.03(8) specifically provides that a "party shall be limited on appeal to issues in the prehearing statement except that when good cause is shown the appellate court may permit additional issues to be submitted upon timely motion." As noted by our Supreme Court, "the significance of this rule is that the Court of Appeals will not consider arguments to reverse a judgment that have not been raised in the prehearing statement or on a timely motion." *American General Home Equity, Inc. v. Kestel*, 253 S.W.3d 543, 549 (Ky. 2008). *See also Sallee v. Sallee*, 142 S.W.3d 697, 698 (Ky. App. 2004)

The Abdullahs' prehearing statement set forth one issue for appeal: "Whether the Arbitration Agreement signed by Appellant, Milando Abdullah, was enforceable, conscionable, signed with requisite consideration, constitutional and binding to all Appellants of this action?" It was not until they filed their appellate brief that the Abdullahs claimed that the trial court erred in failing to allow discovery or hold a hearing before ruling on the validity of the arbitration agreement. Accordingly, since that issue was not raised either in the prehearing statement or by timely motion seeking permission to submit the issue for "good

cause shown," CR 76.03(8), we must conclude that the issue is not properly before this Court for review.

Next, the Abdullahs argue that because only Milando signed the agreement, the arbitration provisions cannot be enforced against the other family members. However, we agree with the trial court's reliance upon the *Peay* decision. Therein, husband and wife plaintiffs sued the retailer and manufacturer of a home they had purchased, claiming various defects in the construction. The manufacturer filed a motion to compel arbitration, which was denied by the trial court. On appeal, this Court held, in part, that the wife could not be bound by the arbitration provisions because only the husband had signed the arbitration agreement during the purchase of the home. However, on discretionary review, the Kentucky Supreme Court disagreed, holding instead:

> The absence of Lori's signature on the agreement to arbitrate did not foreclose the possibility that she had otherwise bound herself to that contract. "[I]t is not always necessary for both parties to sign a contract, particularly where one has signed and both parties thereafter act as if they had a binding contract." *Cowden Mfg. Co., Inc. v. Sys. Equip. Lessors, Inc.*, 608 S.W.2d 58, 61 (Ky.App.1980). The general rule is: "In the absence of a statute requiring a signature or an agreement that the contract shall not be binding until it is signed, parties may become bound by the terms of a contract, even though they do not sign it, where their assent is otherwise indicated." *Id.* (citation omitted).

Id., 406 S.W.3d at 837.

As in *Peay*, Rahman Abdullah knew or should have known of the material fact that Milando signed an agreement with Aaron's to lease the furniture.

Although we cannot and should not reasonably extend that knowledge to their minor children, it is nonetheless clear that the furniture was delivered to the Abdullahs and that all family members received the benefit of the lease contract. Thus, we agree with the trial court that the family is bound by the arbitration provisions even though Milando was the only signatory to the agreement. To hold otherwise in the context of the facts presented herein would lead to a ludicrous result.

Finally, the Abdullahs argue that the trial court should have invalidated the arbitration agreement on the grounds that Milando did not knowingly and voluntarily waive her constitutional right to a jury trial. The Abdullahs contend that the trial court erred in relying on *Hathaway v. Eckerele*, 336 S.W.3d 83 (Ky. 2011), because the waiver of a constitutional right involves a heightened standard of scrutiny. We disagree.

In *Hathaway*, a similar constitutional argument was raised by a consumer challenging the enforceability of an arbitration clause in an automobile purchase contract. In rejecting such, the Kentucky Supreme Court concluded,

> Appellant argues that the arbitration clause is unconscionable because Commonwealth Dodge never told her that signing the vehicle purchasing agreement would result in a waiver of her right to trial by jury and appeal. But, "[i]t is the settled law in Kentucky that one who signs a contract is presumed to know its contents, and that if he has an opportunity to read the contract which he signs he is bound by its provisions, unless he is misled as to the nature of the writing which he signs or his signature has been obtained by fraud." *Clark v. Brewer,* 329 S.W.2d 384, 387 (Ky.1959). Since

> Appellant presents no evidence that Commonwealth Dodge attempted to conceal the arbitration clause, deceive her, or fraudulently induced her to sign the agreement, we find her argument meritless.

Id. at 89-90.

Likewise, in *Dutschke v. Jim Russell Realtors, Inc.*, 281 S.W.3d 817 (Ky. App. 2008), the appellants contended that Kentucky Uniform Arbitration Act contained in KRS Chapter 417 (KUAA)[2] violated Section 7 of the Kentucky Constitution by denying them their right to a trial by jury upon their claim that they were fraudulently induced into entering the subject real estate contract. Disagreeing, a panel of this Court observed,

> Section 7 of the Kentucky Constitution provides, "The ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate, *subject to such modifications as may be authorized by this Constitution*." (Emphasis added). Thus, the Section contemplates that there may be other provisions in the Constitution which may make exceptions to the general rule that a citizen is entitled to a trial by jury. One of these exceptions is contained in Section 250 of the Constitution, which provides that "[i]t shall be the duty of the General Assembly to enact such laws as shall be necessary and proper to decide differences by arbitrators, the arbitrators to be appointed by the parties who may choose that summary mode of adjustment."
>
> We believe Section 250 to be dispositive of the issue. The Section specifically provides for a system of arbitration to be enacted by the legislature and, by definition, arbitration does not include a trial by jury. . . . Accordingly, we disagree with the Dutschkes' contention

[2] In 1984, Kentucky adopted the Uniform Arbitration Act, codified at Chapter KRS 417. *Bridgestone/Firestone v. McQueen*, 3 S.W.3d 366, 367 (Ky. App. 1999). The relevant provisions are nearly identical to those of the FAA.

> that the KUAA violates Section 7 of the Kentucky Constitution.

Id. at 823 (citations omitted). This Court further noted,

> [A]nalogizing to a standard often used in the waiver of constitutional rights in criminal cases, the Dutschkes contend that the standard which should be applied in evaluating the validity of an arbitration clause is "an affirmative demonstration that the contract was freely, knowingly, and voluntarily entered into[.]"
>
> The relevant standard concerning the validity of an arbitration clause has previously been established as follows: "[t]he burden of establishing the existence of an arbitration agreement that conforms to statutory requirements rests with the party seeking to enforce it, but once prima facie evidence thereof has been presented, the statutory presumption of its validity (KRS 417.050) accrues, and the burden of going forward with evidence to rebut the presumption then shifts to the party seeking to avoid the agreement, . . . and this is a heavy burden." This standard was reaffirmed in *Louisville Peterbilt*. *Id.* at 857.
>
> We are unpersuaded that in order for a party to be bound by an arbitration clause that his acquiescence to the agreement must be proven under the same standards applicable to a defendant's waiver of a constitutional right in a criminal case.

Id. at 824.

For the reasons set forth herein, we conclude that the trial court properly found that the arbitration agreement contained in the lease agreement between the Abdullahs and Aaron's was a valid contract under the provisions of the Kentucky Uniform Arbitration Act and the Federal Arbitration Act.

The opinion and order of the Jefferson Circuit Court granting Aaron's motion to compel arbitration and dismissing the Abdullahs' negligence action is affirmed.

ALL CONCUR.

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