[Cite as *Oglesby v. Murphy & Son, Inc.*, 2010-Ohio-4139.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94566

JAMES OGLESBY

PLAINTIFF-APPELLANT

vs.

MURPHY & SON, INC.

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas

Case No. CV-705773

BEFORE: Stewart, P.J., Dyke, J., and Celebrezze, J.

RELEASED AND JOURNALIZED: September 2, 2010

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MELODY J. STEWART, P.J.:

{¶ 1} This case came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1,[1] the record from the Cuyahoga County Court of Common Pleas, the briefs and oral argument of counsel. Plaintiff-appellant, James Oglesby, appeals from an order that stayed proceedings on his breach of contract and Consumer Sales Practices Act complaint against defendant-appellee, Murphy & Son, Inc. ("M&S"), a home improvement contractor, and ordered the parties to submit their dispute to arbitration. Oglesby maintains that the arbitration clause in the contract is unenforceable as being both procedurally and substantively unconscionable and, alternatively, that his claims are independent of the arbitration agreement.

I

{¶ 2} The court did not err by staying the proceedings and referring the matter to arbitration because Oglesby failed to show that the arbitration clause is either procedurally or substantively unconscionable.

{¶ 3} Consistent with paragraph one of the syllabus to *Hayes v. Oakridge Home*, 122 Ohio St.3d 63, 2009-Ohio-2054, 908 N.E.2d 408, we find no facts in the record to prove that the circumstances surrounding the parties' contract rendered the arbitration clause procedurally unconscionable. Oglesby's age (70 years at the time he filed his complaint) and asserted health issues are not, in and

[1]App.R. 11.1(E) states: "Determination and judgment on appeal. It shall be sufficient compliance with App. R. 12(A) for the statement of the reason for the court's decision as to each error to be in brief and conclusionary form." See, also, Form 3, Appendix of Forms to the Rules of Appellate Procedure.

of themselves, a sufficient basis for finding the agreement procedurally unconscionable. Id. at ¶29. Moreover, "simply showing that a contract is preprinted and that the arbitration clause is a required term, without more, fails to demonstrate the unconscionability of the arbitration clause." *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, at ¶46. Oglesby makes no viable claim that the arbitration provision was obtained through adhesion, and there is no evidence in the record that he lacked the ability to select a different contractor who might provide different contract terms. In any event, *Taylor* notes that "'few consumer contracts are negotiated one clause at a time,'" id. at ¶50, quoting *Carbajal v. H & R Block Tax Servs., Inc*. (C.A.7, 2004), 372 F.3d 903, 906, and that form contracts of a kind signed by Oglesby, even if the product is of unequal bargaining power, offer certain advantages to consumers that result in lower transaction costs.

{¶ 4} Even though the failure to show that an arbitration provision in a contract is procedurally unconscionable defeats a claim that an arbitration clause is unenforceable due to unconscionability, id. at ¶53, Oglesby likewise offered no evidence to establish the cost of arbitration, so he did not show that the cost of arbitration was prohibitively expensive for him (he waited nearly 30 days after the court stayed the proceedings to file a poverty affidavit). Id. at ¶57. Oglesby's appellate brief does contain some information regarding the average costs of arbitration, but he did not offer that information to the court, so we will not consider that information on appeal. Id. at ¶57. As *Taylor* stated, "[t]he lack of evidence

before the trial court of excessively high arbitration costs undercuts [appellant's] claim that arbitration costs would be prohibitively expensive." Id.

II

{¶ 5} We likewise reject Oglesby's argument that his tort claims against M&S are independent of and outside the arbitration provision. The arbitration clause is very broad and encompasses "[a]ll claims and disputes and other matters in question between the contractor and purchaser arising out of, or relating to, this contract or the breach thereof * * *." When faced with a broad arbitration clause, such as one covering any dispute arising out of an agreement, a court should follow the presumption of arbitration and resolve doubts in favor of arbitration. *Alexander v. Wells Fargo Fin. Ohio 1, Inc*., 122 Ohio St.3d 341, 2009-Ohio-2962, 911 N.E.2d 286, at ¶13. Oglesby offers no evidence to show with positive assurance that the "arbitration clause is not susceptible of an interpretation that covers the asserted dispute." Id., citing *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 471, 1998-Ohio-294, 700 N.E.2d 859.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MELODY J. STEWART, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., CONCURS;
ANN DYKE, J., CONCURS IN JUDGMENT ONLY