[Cite as *Varga v. Soto*, 2020-Ohio-1626.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

DIANE L. VARGA, :

Plaintiff-Appellee, :

No. 109025

v. :

SUSAN G. SOTO, ET AL. :

Defendants-Appellants. :

JOURNAL ENTRY AND OPINION

JUDGMENT: REVERSED AND REMANDED
RELEASED AND JOURNALIZED: April 23, 2020

Civil Appeal from the Cuyahoga County Common Pleas Court
Case No. CV-19-911321

Appearances:

Flynn, Keith & Flynn and Jason A. Whitacre, *for appellee.*

Coakley Lammert Co., L.P.A., Cynthia A. Lammert, and Richard T. Lobas, *for appellants*.

SEAN C. GALLAGHER, P.J.:

{¶ 1} This cause came to be heard on the accelerated calendar pursuant to App.R. 11.1 and Loc.App.R. 11.1. By designating this as an accelerated appeal, it has been "agreed that we may render a decision in 'brief and conclusionary form'

consistent with App.R. 11.1(E)." *State v. D.F.*, 8th Dist. Cuyahoga No. 104410, 2017-Ohio-534, ¶ 1; *Shaker Hts. v. Brandon Profit El-Bey*, 8th Dist. Cuyahoga Nos. 105701 and 105702, 2017-Ohio-9022, ¶ 1.

{¶ 2} Diane Varga filed a complaint that generally advances claims for fraud in the failure to disclose certain latent defects before the consummation of the home-sale agreement. As is pertinent to the interlocutory claims before this court, Lighthouse Home Inspections, L.L.C. was hired by Varga to conduct a visual inspection of the home before the completed sale. The written agreement between Lighthouse and Varga contained two clauses of significance: an agreement to arbitrate any dispute that arises between the parties through binding arbitration and a limitation-of-liability clause that caps Lighthouse's potential liability to $325 — the cost of the visual inspection. The trial court denied Lighthouse's motion to compel arbitration.

{¶ 3} In the sole assignment of error, Lighthouse claims the trial court erred in refusing to enforce the arbitration agreement. We agree, and therefore, we reverse the decision of the trial court.

{¶ 4} Ohio's public policy encourages the use of arbitration proceedings to settle disputes. *Schaefer v. Allstate Ins. Co.*, 63 Ohio St.3d 708, 711-712, 590 N.E.2d 1242 (1992). "An arbitration provision may, however, be unenforceable on grounds existing at law or in equity for the revocation of a contract. R.C. 2711.01(A). One of those grounds is unconscionability." *English v. Cornwell Quality Tools Co.*, 9th Dist. Summit No. 22578, 2005-Ohio-6983, ¶ 7. "The party

seeking to compel arbitration bears the burden of establishing the existence of an enforceable arbitration agreement between the party against whom the moving party seeks enforcement." *Kaminsky v. New Horizons Computer Learning Ctr. of Cleveland*, 2016-Ohio-1468, 62 N.E.3d 1054, ¶ 14 (8th Dist.). "The party seeking to establish that an arbitration clause is unconscionable must show that the provision is both procedurally and substantively unconscionable." *English* at ¶ 7, citing *Neubrander v. Dean Witter Reynolds, Inc.*, 81 Ohio App.3d 308, 311-312, 610 N.E.2d 1089 (1992).

{¶ 5} Appellate courts review whether a party has agreed to submit an issue to arbitration or questions of unconscionability under a de novo standard. *Doe v. Contemporary Servs. Corp.*, 8th Dist. Cuyahoga No. 107229, 2019-Ohio-635, ¶ 15, citing *McCaskey v. Sanford-Brown College*, 8th Dist. Cuyahoga No. 97261, 2012-Ohio-1543, ¶ 7-8. No deference is afforded to the trial court's decision. *Id.*, citing *Wisniewski v. Marek Builders, Inc.*, 2017-Ohio-1035, 87 N.E.3d 696, ¶ 5 (8th Dist.).

{¶ 6} In this case there is no dispute that the parties agreed to binding arbitration to resolve their particular dispute and that the arbitration clause is not substantively and procedurally unconscionable. *Bozich v. Kozusko*, 9th Dist. Lorain No. 09CA009604, 2009-Ohio-6908, ¶ 12-13. Varga has never presented a claim that the arbitration provision is unconscionable or that her claims are outside the scope of the arbitration clause in this case. Varga's sole claim is that under *O'Donoghue v. Smythe, Cramer Co.*, 8th Dist. Cuyahoga No. 80453, 2002-

Ohio-3447, ¶ 31, and *McDonough v. Thompson*, 8th Dist. Cuyahoga No. 84342, 2004-Ohio-6647, ¶ 25, there is an additional, but limited exception to enforcing an arbitration provision outside of the general contract principles.

{¶ 7} In both *O'Donoghue* and *McDonough*, it was concluded that although the respective arbitration provisions were not unconscionable, the arbitration clauses were nonetheless unenforceable because the contracts also contained limitation-of-liability clauses that limited the plaintiffs' respective recovery to an amount that was less than the nonrefundable cost to arbitrate. *O'Donoghue* at ¶ 31; *McDonough* at ¶ 25. According to *O'Donoghue* and *McDonough*, the plaintiff could not recover any amount if forced to arbitrate because of the interplay between the two contractual provisions. Without citing any theory of contract that supports such a proposition, both panels concluded that the arbitration clause was invalid and unenforceable.

{¶ 8} Neither case is applicable to the current facts. In this case, Varga alleged that the cost of arbitration ($200) would *not* exceed the limitation of liability clause ($325).[1] Further, Varga is contesting the enforceability of the

[1] Varga's claim that Lighthouse failed to advance the argument that the cost of arbitration did not exceed the limitation-of-liability clause in its motion for summary judgment is based on a misperception of the relative burdens. Lighthouse demonstrated the existence of an enforceable arbitration provision, and therefore, the burden to demonstrate that the arbitration provision was unenforceable shifted to Varga. Varga advanced the claim regarding the cost of arbitration as a defense to the otherwise enforceable arbitration provision. Thus, Lighthouse did not raise this issue for the first time in this appeal.

limitation-of-liability clause.[2] The determination of whether that clause is enforceable must be considered by the arbitrator, not the trial court in determining the enforceability of the arbitration provision. *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, ¶ 68 ("Because the arbitration clause itself is enforceable, the question of the meaning of paragraph seven and its enforceability under Ohio law, like that of other contract terms, will be for the arbitrator in the first instance.").

{¶ 9} The interplay between the arbitration and limitation-of-liability clauses as discussed under Varga's argument presents a "chicken or egg" paradox (a paradox describing the problem of determining cause and effect). If the limitation of liability is enforced, Varga could only recover $325, and the nonrefundable $200 cost of arbitration would severely impact her actual recovery — at the least, bringing Varga's case more in line with *O'Donoghue* and *McDonough*. On the other hand, if the limitation-of-liability clause is deemed unenforceable, then Varga's reliance on the limited exception as espoused in *O'Donoghue* and *McDonough* would be misplaced. In that situation, the cost of arbitration would not demonstrably exceed that which could be recovered through arbitration and the limited exception announced in *O'Donoghue* and *McDonough* would be inapplicable. That observation presents an existential question of sorts — when reviewing contracts that contain both types of provisions, should the trial

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[2] *See Plaintiff's Brief in Opposition to Defendant Lighthouse Home Inspections, LLC's, Motion for Judgment on the Pleadings or, Alternatively, to Compel Arbitration* (filed Aug. 5, 2019, p. 4).

court declare the arbitration clause unenforceable based on enforcement of the limitation-of-liability clause or declare that the limitation-of-liability clause is unenforceable thereby mandating enforcement of the arbitration clause?

{¶ 10} Varga is splitting the line between those two scenarios and is asking to enforce the limitation-of-liability clause but only to the extent that it precludes enforcement of the arbitration provision — she would also like to be relieved of her agreement to the limitation-of-liability clause after using that clause as a shield against arbitration. Varga cannot rely on the existence of the limitation-of-liability clause to avoid arbitration and then advance a claim that the limitation-of-liability clause is itself unenforceable once the right to arbitration has been denied to Lighthouse. It is axiomatic that a party cannot disclaim the enforceability of a contractual provision after already reaping the benefit of its existence. If Varga wishes to rely on *McDonough* and *O'Donoghue*, at the very least, she would need to concede that the limitation-of-liability clause is enforceable. If Varga wishes to challenge the enforceability of the limitation-of-liability clause, she cannot rely on its existence to deem the arbitration clause unenforceable — the determination of the validity of other provisions of a contract that contains an enforceable arbitration clause is expressly reserved for the arbitrator. *Benfield* at ¶ 68.

{¶ 11} *McDonough* avoided Varga's proposed paradox by expressly ignoring the trial court's oral decision to deem the limitation-of-liability clause unenforceable — the *McDonough* panel presumed the limitation-of-liability clause was enforceable for the purposes of the appeal despite the trial court's conclusion

to the contrary. *McDonough*, 8th Dist. Cuyahoga No. 84342, 2004-Ohio-6647, at ¶ 7, fn. 1. The fact that the trial court in *McDonough* had already concluded the limitation-of-liability clause to be unenforceable directly undercut *McDonough's* conclusion that no relief could be afforded in arbitration because the cost of arbitration exceeded the value that could be recovered based on enforcement of the limitation-of-liability clause. The trial court, in that case, already concluded that the limitation was not enforceable, and therefore, there was no contractual limitation to the amount plaintiff could have recovered through arbitration. In *O'Donoghue*, it was simply presumed that the limitation-of-liability clause was enforceable — a result Varga wishes to avoid. *O' Donoghue*, 8th Dist. Cuyahoga No. 80453, 2002-Ohio-3447, ¶ 31. Because of the presumption in *O'Donoghue* and the unresolved paradox in *McDonough*, both cases provide limited precedential value for the purposes of resolving the current dispute. *See, e.g., Kozusko*, 9th Dist. Lorain No. 09CA009604, 2009-Ohio-6908, ¶ 12 (noting the "unique" circumstances of *McDonough* precluded the panel from applying its conclusion).

{¶ 12} Varga has not demonstrated that the arbitration provision is procedurally or substantively unconscionable, and therefore under general contract principles, the parties' agreement to present their dispute to binding arbitration is enforceable. R.C. 2711.02(A). Further, the limited exception announced in *O'Donoghue* and *McDonough* is inapplicable based on the particular facts of this case — a conclusion that is derived from the fact that the nonrefundable cost of arbitration does not facially exceed the contractual

limitation of liability and because Varga is contesting the enforceability of the limitation-of-liability clause that could result in her recovering more than the cost of arbitration. We reverse the decision of the trial court and remand for further proceedings with the express mandate to compel arbitration of all claims as between Varga and Lighthouse. All other claims, against the remaining defendants, are unaffected by our decision. Reversed and remanded.

{¶ 13} This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellants recover from appellee 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 common pleas court 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.

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SEAN C. GALLAGHER, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and
MICHELLE J. SHEEHAN, J., CONCUR