[Cite as *Bozich v. Kozusko*, 2009-Ohio-6908.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

NEAL BOZICH	C.A. No. 09CA009604
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
BILL KOZUSKO	COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO
Appellee	CASE No. 08CV156951

DECISION AND JOURNAL ENTRY

Dated: December 30, 2009

WHITMORE, Judge.

{¶1} Plaintiff-Appellants, Neal Bozich and Alicia Whiting-Bozich ("the Boziches"), appeal the decision of the Lorain County Court of Common Pleas granting Defendant-Appellees, Bill Kozusko d/b/a/ Kozusko's Home Inspection Services' ("Kozusko") motion to stay proceedings and compel arbitration. This Court affirms.

I

{¶2} Prior to purchasing their new home in May 2006, the Boziches contracted with Kozusko to perform a residential home inspection. Kozusko had the Boziches sign a Pre-Inspection Agreement ("the Agreement") and an Addendum to the Pre-Inspection Agreement ("the Addendum") at the time the inspection was performed. The inspection report that Kozusko prepared did not reveal any major structural defects or signs of water damage in the basement of the home.

{¶3} According to the Boziches' complaint, approximately five months after they moved into their new residence, they experienced "large amounts of water seep[ing] into the basement" in addition to "severe *** cracking" and inward movement of foundation blocks. The Boziches filed a complaint against Kozusko, their realtor, their realtor's real estate agency, the sellers, and the sellers' real estate agency. The counts against Kozusko allege negligence and violations of the Consumer Sales Practices Act ("CSPA") and seek damages in the amount of $70,000, subject to trebling and punitive damages as permissible.

{¶4} After filing his answer, Kozusko filed a motion to dismiss, or in the alternative, to stay the proceedings and compel arbitration pursuant to the terms of the Addendum. The Boziches opposed the motion and Kozusko subsequently filed a reply brief. The trial court denied Kozusko's motion to dismiss and set a hearing on his motion to stay the proceedings, but the parties agreed to waive the hearing and have the matter decided on the pleadings.

{¶5} The trial court granted Kozusko's motion to compel arbitration. In doing so, the court concluded that the arbitration provision was valid and enforceable, but that the limitation of liability clause in the Agreement was both procedurally and substantively unconscionable in that it limited a party's recovery to the amount of the inspection fee, which in this case was $290. The Boziches timely appealed and assert three assignments of error for our review. None of the other named defendants sought to enforce the arbitration provision and therefore are not a party to this appeal.

II

Assignment of Error Number One

"IT WAS PREJUDICIAL ERROR TO STAY PROCEEDINGS AND COMPEL ARBITRATION IN AN ACTION FOR VIOLATIONS OF THE OHIO CONSUMER SALES PRACTICES ACT WHERE THE ARBITRATION

CLAUSE COUPLED WITH A LIMITATION OF LIABILTY CLAUSE RENDERED THE CONTRACT UNCONSCIONABLE."

{¶6} In their first assignment of error, the Boziches argue that the Addendum containing the arbitration provision was both procedurally and substantively unconscionable, thereby rendering the Agreement unconscionable. Specifically, the Boziches assert that the arbitration provision in the Addendum, and therefore the Agreement itself, is procedurally unconscionable because it left them without bargaining power and without alternatives. They further assert that the arbitration provision, when read in conjunction with the limited liability clause, is substantively unconscionable because together they preclude recovery, which is commercially unreasonable. We disagree.

{¶7} Generally, we review a trial court's disposition of a motion to stay trial pending arbitration under an abuse of discretion standard. *Porpora v. Gatliff Bldg. Co.*, 160 Ohio App.3d 843, 2005-Ohio-2410, at ¶5. However, the unconscionability of a contract and its provisions is purely a question of law. *Featherstone v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 9th Dist. No. 04CA0037, 2004-Ohio-5953, at ¶12; *Eagle v. Fred Martin Motor Co.*, 157 Ohio App.3d 150, 2004-Ohio-829, at ¶13. Therefore, we review the trial court's determination of unconscionability de novo. *Featherstone* at ¶12, citing *Eagle* at ¶13. Additionally, "[a] determination of unconscionability is a fact-sensitive question that requires a case-by-case review of the surrounding circumstances." *Featherstone* at ¶12, citing *Eagle* at ¶13.

{¶8} As a matter of public policy, Ohio law strongly favors arbitration as a means to settle disputes. *Schaefer v. Allstate Ins. Co*. (1992), 63 Ohio St.3d 708, 711-712. Where the parties to a contract have agreed to an arbitration clause, courts generally view that clause as the parties' agreement to settle any contractual disputes that fall within the scope of the clause by arbitration, instead of by litigation. *Williams v. Aetna Fin. Co*. (1998), 83 Ohio St.3d 464, 471.

Such clauses are enforceable under Ohio law "except upon grounds that exist at law or in equity for the revocation of any contract." R.C. 2711.01(A). One such ground is unconscionability. *Porpora* at ¶6; *Eagle* at ¶29. A party seeking to invalidate an arbitration clause on grounds of unconscionability must establish that the provision is both procedurally and substantively unconscionable. *Collins v. Click Camera & Video, Inc.* (1993), 86 Ohio App.3d 826, 834. Thus, a plaintiff must "prove a 'quantum' of both prongs in order to establish that a particular contract is unconscionable." Id.

{¶9} "Procedural unconscionability concerns the formation of the agreement and occurs when no voluntary meeting of the minds is possible." *Porpora* at ¶7, citing *Bushman v. MFC Drilling, Inc.* (July 19, 1995), 9th Dist. No. 2403-M, at *3. This Court has held that when determining procedural unconscionability, a reviewing court must consider factors bearing directly to the relative bargaining position of the parties. *Porpora* at ¶7; *Featherstone* at ¶13; *Eagle* at ¶31. Those factors include "age, education, intelligence, business acumen, experience in similar transactions, whether terms were explained to the weaker party, and who drafted the contract." *Featherstone* at ¶13, quoting *Eagle* at ¶31. "Substantive unconscionability encompasses those factors that concern the contract terms themselves[.]" *Eagle* at ¶31. "Contract terms are [substantively] unconscionable if they are unfair and commercially unreasonable." *Porpora* at ¶8, citing *Bank One, N.A. v. Borovitz*, 9th Dist. No. 21042, 2002-Ohio-5544, at ¶16.

{¶10} Initially, we note that the Boziches do not appeal the trial court's finding that the limitation of liability clause is unconscionable. Additionally, we note that the Agreement contains a severability clause which states that the parties agree that "should a court of competent jurisdiction determine and declare that any portion of this Agreement is ***

unenforceable, the remaining provisions and portions shall remain in full force and effect." Therefore, despite the unenforceability of the limitation of liability clause, the remaining provisions in the Agreement and the Addendum (which contains the arbitration provision) remain fully enforceable. See, e.g., *Broughsville v. OHECC, LLC*, 9th Dist. No. 05CA008672, 2005-Ohio-6733, at ¶27-31.

{¶11} Next, we consider the Boziches' assertion that the arbitration provision contained in the Addendum is substantively unconscionable. The Addendum to the Agreement is set forth on a separate page and lists only one provision on that page. Under a caption in the middle of the page titled "ADDENDUM TO PRE-INSPECTION AGREEMENT," is the following provision:

> "Any dispute, controversy, interpretation or claim including claims for, but not limited to, breach of contract, any form of negligence, fraud or misrepresentation arising out of, from or related to, this contract or arising out of, from or related to the inspection or inspection report shall be submitted to final and binding arbitration under the Rules and Procedures of the Expedited Arbitration of Home Inspection Disputes of *Construction Arbitration Services, Inc.* The decision of the Arbitrator appointed thereunder shall be final and binding and judgement (sic) on the Award may be entered in any Court of competent jurisdiction."

Additionally, in the body of the Agreement is a clause which provides that if Kozusko is "found liable due to breach of contract, breach of warranty, negligence, *** or any other theory of liability, then [Kozusko's] liability *** shall be limited to a sum equal to the amount of the fee paid by [the Boziches] to [Kozusko] for the inspection and report." The Boziches assert that the interaction between the foregoing limitation of liability clause and the arbitration provision creates the net effect of providing a commercially unreasonable arbitration provision. That is, the Boziches argue that it is not commercially reasonable to impose an arbitration fee of $1,350 and in turn limit a party's recovery to $290 (the cost of the inspection). Because the combination of the two provisions deprives them of any real remedy, they view the arbitration provision as

substantively unconscionable. This argument, however, is illogical, in that the Boziches expressly state that they are *not* challenging the trial court's finding that the limitation of liability clause is unenforceable, but in turn rely on the enforcement of such a limitation to argue that the arbitration provision is unconscionable.

{¶12} The Boziches direct this Court to *McDonough v. Thompson*, 8th Dist. No. 84342, 2004-Ohio-6647, in support of their argument on substantive unconscionability. In that case, the McDonoughs' home inspection contract contained similar limitation of liability and arbitration provisions as in the Boziches' agreement. In *McDonough*, however, the Eighth District specifically concluded that the arbitration provision in the McDonoughs' home inspection contract *was not* procedurally or substantively unconscionable, as is argued by the Boziches in this case. *McDonough* at ¶19-20. Instead, the appellate court concluded that "[g]iven the unique circumstances of [the McDonoughs'] case, *other principles of equity* clearly support the trial court's decision to deny the motion to compel binding arbitration." (Emphasis added.) Id. at ¶21. Thus, *McDonough* does not support a finding of substantive unconscionability, as is argued by the Boziches. Moreover, because the Boziches do not contest the unenforceability of the limitation of liability clause, their case is factually inapposite to the "unique circumstances" of the McDonoughs. Id.

{¶13} The Boziches have not alleged that the terms of the arbitration provision, standing alone, are unfair or commercially unreasonable. *Porpora* at ¶8. Having concluded that the Boziches have failed to demonstrate that the arbitration provision is substantively unconscionable, we need not consider their arguments with respect to procedural unconscionability, as the test for unconscionability requires evidence of both. *Collins*, 86 Ohio

App.3d at 834; *Broughsville*, at ¶26. Accordingly, the Boziches' first assignment of error lacks merit and is overruled.

Assignment of Error Number Two

> "IT WAS A PREJUDICIAL ERROR FOR THE COURT BELOW TO STAY PROCEEDINGS AND COMPEL ARBITRATION IN AN ACTION FOR VIOLATIONS OF THE OHIO CONSUMER SALES PRACTICES ACT WHERE THE ARBITRATION WOULD BE SUBJECT TO RULES VIOLATING THE PURPOSES AND POLICY OF THAT ACT."

{¶14} In their second assignment of error, the Boziches argue that the arbitration provision should be unenforceable because the rules that would govern the arbitration frustrate the purpose of the CSPA. Specifically, they argue that the rules: (1) require confidentiality which prohibits the findings of any CSPA violations from being made public; (2) preclude them from seeking additional remedies under the CSPA because the rules limit their recovery to the scope of the Agreement; and (3) prohibit them from acting as a private attorney general as is the design of the CSPA under R.C. 1345.09. In essence, the Boziches argue that, because their cause of action is based in the CSPA, and the rules governing the arbitration under the terms of the Agreement inhibit the remedial nature of that statute, the arbitration provision should be considered unenforceable as it is against public policy, akin to our decision in *Eagle v. Fred Martin Motor Co.*, 157 Ohio App.3d 150, 2004-Ohio-829. We disagree.

{¶15} In *Eagle*, this Court concluded that the rules governing the arbitration in that case violated public policy and directly hindered the consumer protections afforded by the CSPA. *Eagle* at ¶61-74. Consequently, we held that the arbitration provision was substantively unconscionable based on the arbitration rules it employed. *Eagle* at ¶74. Based on other evidence in that case, we concluded that the arbitration clause, as applied to Eagle, was procedurally unconscionable as well. *Eagle* at ¶52-60. Given the evidence of both substantive

and procedural unconscionability, we held that the arbitration provision was unenforceable. The Boziches, however, have blurred the discrete rationale underlying procedural and substantive unconscionability as set forth in *Eagle* to suggest that, where an arbitration provision contravenes the public policy goals implicit in the CSPA and is determined to be substantively unconscionable, that alone would render the arbitration provision unenforceable. Such is not the case. As previously explained, "a 'quantum' of both prongs [is necessary] to establish that a particular contract is unconscionable." *Collin*, 86 Ohio App.3d at 834.

{¶16} Moreover, we note that the rules governing the arbitration in *Eagle*, which evidenced substantive unconscionability, were vastly different from the arbitration rules governing this case. In *Eagle*, the arbitration rules required that the arbitration proceedings remain confidential and further, subjected a party to sanctions for improperly disclosing confidential information. *Eagle* at ¶69. The rules further prohibited an arbitration award from including any reasons, findings of fact or conclusions of law unless the parties had previously agreed otherwise, and to the extent that such information could be made available to Eagle under the arbitration rules, she was required to pay an additional $1,250 to obtain it. Id. at ¶70-71. Additionally, the arbitration provision at issue expressly precluded Eagle from bringing a claim as a class action, participating as a member of a class action, or acting as a private attorney general. Id. at ¶34, 73.

{¶17} The Boziches attached a copy of the "Rules for the Expedited Arbitration of Home Inspection Disputes" issued by Construction Arbitration Services, Inc. to their objection to Kozusko's motion to compel arbitration. The confidentiality provision contained in that document reads as follows:

> "The proceedings are intended to be confidential. As an informal proceeding, there is no requirement that a stenographic record be taken of the hearing. Any

> party, who wishes to, may make such a provision for a certified court stenographer at that party's own expense. A copy of the transcript must be provided to the arbitrator and a copy made available for the review of the other party. The transcript is agreed by the parties to be confidential. The parties may make appropriate notes of the proceedings, but audio or video recordings are strictly prohibited."

While the rule does provide for confidentiality relative to the arbitration proceedings, it does not, as in *Eagle*, subject the Boziches to sanctions for any violation of confidentiality. Furthermore, it does not prohibit an arbitration award from including the rationale for the award or require the Boziches to pay an additional sum of money in order to obtain a copy of the arbitrator's rationale. Moreover, there is no express statement anywhere in the rules, as there was in *Eagle*, prohibiting the Boziches from acting as a private attorney general or from participating in or initiating a class action suit against Kozusko.

{¶18} The Boziches also allege that the terms of the rule governing the scope of the arbitration award effectively limit their recovery and foreclose other remedies which would be available to them under the CSPA. The rule they point to provides that "[t]he arbitrator may make any award that is just and equitable within the scope of the agreement[.]" We do not consider this limitation alone, however, tantamount to substantive unconscionability, nor do we believe it eviscerates any substantive rights to which the Boziches are entitled under the CSPA. See, e.g., *Hawkins v. O'Brien*, 2nd Dist. No. 22490, 2009-Ohio-60, at ¶33-34 (noting that nothing in the arbitration clause denied the plaintiff any of the substantive rights conferred to him under the CSPA which were sought in his complaint).

{¶19} While we acknowledge that Kozusko has alleged on appeal that the Boziches have relied on an outdated version of the rules which would govern the parties' arbitration, we note that he made no such argument to the trial court, nor did he append a different version of the rules to his motion below, despite his attempt to incorporate updated rules into his appellate

brief. Accordingly, we are bound to rely only on the documents properly in the record certified on appeal to this Court. App.R. 9(A).

{¶20} For the foregoing reasons, the Boziches' second assignment of error is not well taken. Accordingly, it is overruled.

Assignment of Error Number Three

> "IT WAS PREJUDICIAL ERROR TO STAY PROCEEDINGS AND COMPEL ARBITRATION IN AN ACTION FOR VIOLATIONS OF THE OHIO CONSUMER SALES PRACTICES ACT WHERE THE SUPPLIER OFFERED A CONTRACT CONTAINING AN UNCONSCIONABLE PROVISION TO A CONSUMER, WHICH BY ITSELF IS A VIOLATION OF THE ACT."

{¶21} In their third assignment of error, the Boziches argue that the trial court erred in compelling them to arbitrate their dispute under a contract that inherently violates the CSPA in that it contains unconscionable terms. They reiterate their assertion that the limitation of liability clause, taken in conjunction with the arbitration provision, preclude recovery under the contract, which constitutes an "unconscionable act" under R.C. 1345.03(A). We disagree.

{¶22} Again, we note that the Boziches' argument ignores the fact that the trial court severed the limitation of liability clause from the agreement, thereby eliminating the "trap *** to the consumer" about which they complain. Additionally, as discussed supra, the Boziches have failed to demonstrate that the arbitration provision at issue in this appeal is, in fact, unconscionable.

{¶23} Moreover, while R.C. 1345.03(A) prohibits a supplier from "commit[ing] an unconscionable act or practice in connection with a consumer transaction[,]" the determination of what constitutes an "unconscionable act" is subject to several considerations, as set forth in R.C. 1345.03(B). The Boziches have not supported their argument that Kozusko committed an "unconscionable act" with any discussion of the statutory considerations outlined in R.C.

1345.03(B) or further developed their argument beyond restating their challenge to the interaction of limitation of liability clause and the arbitration provision. Furthermore, they have not provided this Court with any authority for the proposition that the inclusion of an unconscionable clause, which is subsequently severed and unenforceable under the contract, constitutes an "unconscionable act" under R.C. 1345.03(A).

{¶24} The Boziches' third assignment of error lacks merit. Accordingly, it is overruled.

III

{¶25} The Boziches' assignments of error are overruled. Accordingly, the judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellants.

BETH WHITMORE
FOR THE COURT

MOORE, P. J.
CONCURS

CARR, J.
CONCURS IN JUDGMENT ONLY, SAYING:

{¶26} I concur in judgment only because I would affirm on the basis that Appellants have not demonstrated procedural unconscionability.

APPEARANCES:

ANDREW M. FOWERBAUGH, and THOMAS M. STICKNEY, Attorneys at Law, for Appellants.

AMY S. THOMAS, Attorney at Law, for Appellees.