Reversed and Remanded; Opinion Filed October 27, 2017.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-01507-CV

MICOCINA, LTD. D/B/A TACO DINER, Appellant
V.
JOSE BALDERAS-VILLANUEVA, Appellee

On Appeal from the 95th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-16-06096

MEMORANDUM OPINION

Before Justices Lang, Myers, and Stoddart
Opinion by Justice Stoddart

In this interlocutory appeal,[1] MiCocina, Ltd. d/b/a Taco Diner argues the trial court abused its discretion by denying its motion to compel arbitration of this employment related injury lawsuit. MiCocina contends the trial court abused its discretion because MiCocina carried its burden to prove the existence of a valid arbitration agreement and that the claim is within the scope of the agreement, and appellee did not carry his burden of proving a defense to arbitration. We conclude the trial court abused its discretion by denying the motion, reverse the trial court's order, and remand with instructions to grant the motion to compel arbitration.

BACKGROUND

MiCocina is a non-subscriber to workers' compensation insurance, but maintains a work

[1] We have jurisdiction pursuant to TEX. CIV. PRAC. & REM. CODE ANN. §§ 54.016, 171.098(a)(1).

related injury plan providing certain benefits to employees injured in the course and scope of employment. MiCocina also has a mandatory arbitration policy for claims arising out of such injuries. The arbitration policy is described in a Mutual Agreement to Arbitrate and in the employee handbook.

Jose Balderas-Villanueva (Balderas), who does not speak or read English, was hired as a cook at a Taco Diner restaurant in Dallas in 2014. On December 6, 2015, Balderas was injured at work when an oven exploded. He filed suit against MiCocina to recover damages for his injury. MiCocina moved to compel arbitration under its arbitration policy. In support of the motion, MiCocina relied on the Mutual Agreement to Arbitrate and a one-page document signed by Balderas titled "Acknowledgment of Receipt of Employee Handbook" (Acknowledgment). The Acknowledgment is written in English and memorializes receipt of the Mutual Agreement to Arbitrate, a summary description of the work related injury plan, a department of insurance non-subscriber form, and the company handbook. The Acknowledgment recites that Balderas understands the policies, practices, and rules of conduct contained in the handbook and agrees to abide by them. It also recites that MiCocina reserves the right to change, rescind and add to the policies, practices, and rules contained in the handbook.

The Mutual Agreement to Arbitrate itself is not signed by either party. It provides that MiCocina is engaged in commerce and the Federal Arbitration Act (FAA) governs all aspects of the agreement.[2] The agreement specifies that any of the following actions by an employee will constitute acceptance of its terms: commencing work after receiving notice of the agreement, continuing employment after receiving notice of the agreement, or receiving benefits under the

[2] Parties may expressly agree to arbitrate pursuant to the FAA. *In re Rubiola*, 334 S.W.3d 220, 223 (Tex. 2011) (orig. proceeding); *Roe v. Ladymon*, 318 S.W.3d 502, 510 (Tex. App.—Dallas 2010, no pet.) (where parties agree FAA governs arbitration they are not required to show transaction involves or affects commerce). Therefore, if the arbitration agreement is enforceable under state law contract principles, the FAA will apply.

employee injury plan after notice of the agreement is provided to the employee. Claims covered by the arbitration agreement include any injury suffered by an employee while in the course and scope of employment. Other claims are excluded from the agreement, such as claims for benefits under the employee injury plan. The Mutual Agreement to Arbitrate provides that the company has the right to prospectively terminate the agreement. However, termination is not effective for any covered claim that accrued before the date of termination and termination is not effective until ten days after reasonable notice to a claimant. The agreement recites that it has been translated into Spanish. Copies of the English and Spanish versions were admitted in evidence.

Balderas argued in response to the motion that the Mutual Agreement to Arbitrate was not enforceable because he did not receive notice of the arbitration policy before his injury, MiCocina misrepresented or concealed the terms of the agreement from him, and he was fraudulently induced to sign the Acknowledgment. Balderas asserted in his affidavit that he does not speak or read English and MiCocina did not provide him with copies of the Mutual Agreement to Arbitrate, the summary of the work related injury plan, or the company handbook. He signed the Acknowledgment even though he could not read it because he was told it was the "restaurant's policies" and he was required to sign it in order to go to work. Balderas also asserted the Mutual Agreement to Arbitrate was illusory because MiCocina retained the right to modify the policies stated in the employee handbook.

The trial court conducted an evidentiary hearing on the motion to compel arbitration. *See Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 269 (Tex. 1992) (evidentiary hearing required if material facts necessary to determine issue are controverted). Balderas testified through an interpreter that he does not speak or read English. Balderas met with Manuel Rosas the restaurant director, who spoke with him in Spanish, on July 30, 2014. Balderas explained the

meeting was about things that were not allowed, such as "sexual things and then tattoos and about how you — what you shouldn't do with the people, how you shouldn't be — go back and forth with them." Balderas testified he never received a copy of the Mutual Agreement to Arbitrate or the summary description of the work related injury plan. When Rosas presented the Acknowledgment, Balderas asked what the document was. Rosas told him it was the "restaurant policy." Balderas asked what the document meant and Rosas told him not to worry, "they're just work things." Rosas never told him it was a waiver of his right to a jury trial. According to Balderas, Rosas told him only that "it was related to the work policies, like what he had talked to — about before again, you know, like the tattoos and stuff, just — just the policies." Rosas said that Balderas was required to sign the document in order to start working and that the paper was "just restaurant policy, but [Rosas] never explained to me what this paper was." Balderas signed the paper and started working immediately. Balderas also testified he would not have signed the Acknowledgment if Rosas had explained it to him.

At the meeting, Rosas showed Balderas how to enter a password on an employee website where he could obtain his pay stubs. Balderas logged in "that one time," but Rosas did not tell him anything else about the website. Balderas maintained that he only accessed the website once and did not review any company policies on the website. He never reviewed the employee handbook on the website.

A printout of a computer record from the employee website was admitted in evidence. This printout shows an employee task for Balderas to upload the "TDTx TM Handbook English and Spanish 2015" completed on April 9, 2015. Balderas's employee number is shown in the "Completed By" field of the computer record. Rosas testified that the computer record showed the date and time the employee completed and signed the employee handbook, in both English and Spanish. Rosas testified the arbitration policy for work related injuries is explained in both

versions of the handbook.

After his injury on December 6, 2015, Balderas received some medical treatment, but claimed MiCocina was reluctant to provide it for him. He also received some compensation while he was incapacitated, but not his full pay.

Rosas's testimony differed from Balderas's in several respects. Specifically, Rosas testified he gave Balderas English and Spanish copies of the Mutual Agreement to Arbitrate, employee handbook, and summary description of the work related injury plan before Balderas signed the Acknowledgment. Rosas did not remember if he provided the Acknowledgment to Balderas in Spanish. Rosas believed MiCocina had a Spanish version of the Acknowledgment form at the time, but he did not notice that the Acknowledgment was only in English. According to Rosas, Balderas did not ask what the Acknowledgment was.

Rosas follows a checklist with new hires and explains everything in Spanish if they do not speak English. Rosas explained to Balderas that when he signed the Acknowledgment, he was waiving a jury trial in any lawsuit with the company and that arbitration meant that if Balderas sued the company, it would be in a private courtroom. Rosas helped Balderas logon to the employee website as part of the hiring process. Rosas did not know if Balderas ever logged onto the website after that.

At the conclusion of the hearing, the trial court stated: "The Court hereby finds that no contract formation existed in this case and that the plaintiff did not voluntarily and knowingly waive his right to trial by jury. In fact, the Court further finds that the plaintiff was misled into signing these documents and therefore denies the motion to compel."

STANDARD OF REVIEW

We review the denial of motion to compel arbitration for an abuse of discretion. We defer to the trial court's factual determinations if they are supported by the record, but review

legal determinations de novo. *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 643 (Tex. 2009) (orig. proceeding). Whether an arbitration agreement is enforceable is subject to de novo review. *Id*. Whether a contract is unconscionable at the time it was formed is also a question of law subject to de novo review. *In re Poly-Am., LP*, 262 S.W.3d 337, 349 (Tex. 2008) (orig. proceeding).

APPLICABLE LAW

A party seeking to compel arbitration must establish the existence of a valid arbitration agreement between the parties and that the particular claim is within the scope of the agreement. *See In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 753–54 (Tex. 2001) (orig. proceeding). Courts determine the validity of an agreement to arbitrate under state law governing contract formation. *Poly-Am., LP*, 262 S.W.3d at 347. Once the movant makes this showing, the burden shifts to the opposing party to prove a defense to enforcement of the otherwise valid arbitration agreement. *FirstMerit Bank*, 52 S.W.3d at 756; *Sidley Austin Brown & Wood, LLP v. J.A. Green Dev. Corp.*, 327 S.W.3d 859, 863 (Tex. App.—Dallas 2010, no pet.).

The court determines any specific challenge to the validity of the arbitration agreement, but a challenge relating to the validity of a contract as a whole, and not specifically to the arbitration clause within that contract, must go to the arbitrator. *See Labatt*, 279 S.W.3d at 647–48; *FirstMerit Bank*, 52 S.W.3d at 756 (defenses of unconscionability, duress, fraudulent inducement, and revocation must specifically relate to the arbitration part of a contract and not the contract as a whole if they are to defeat arbitration).

DISCUSSION

An employer may enforce an arbitration agreement entered into during an at-will employment relationship if the employee received notice of the employer's arbitration policy and accepted it. *In re Dallas Peterbilt, Ltd.*, 196 S.W.3d 161, 162–63 (Tex. 2006) (per curiam) (orig.

proceeding); *In re Halliburton Co.*, 80 S.W.3d 566, 568 (Tex. 2002) (orig. proceeding). An at-will employee who receives notice of an employer's arbitration policy and continues working with knowledge of the policy accepts the terms as a matter of law. *Dallas Peterbilt*, 196 S.W.3d at 163.

A. Valid Agreement

It is undisputed that Balderas's claims fall within the scope of the Mutual Agreement to Arbitrate. This appeal focuses on the validity of the arbitration agreement and Balderas's defenses. MiCocina argues it established a valid arbitration agreement because Balderas admitted he signed the Acknowledgment, the Acknowledgment specifically states Balderas received a copy of the Mutual Agreement to Arbitrate, and Balderas commenced working after he signed the Acknowledgment.

Although it is not signed, the Mutual Agreement to Arbitrate is in writing. *See In re Macy's Tex., Inc.*, 291 S.W.3d 418, 418 (Tex. 2009) (per curiam) (orig. proceeding) (observing "[t]he FAA contains no requirements for the form or specificity of arbitration agreements except that they be in writing; it does not even require that they be signed"); *Halliburton*, 80 S.W.3d at 569 (holding arbitration clause was accepted by continued employment). Additionally, "an unsigned paper may be incorporated by reference in the paper signed by the person sought to be charged. The language used is not important provided the document signed . . . plainly refers to another writing." *In re Prudential Ins.*, 148 S.W.3d 124, 135 (Tex. 2004) (orig. proceeding) (quoting *Owen v. Hendricks*, 433 S.W.2d 164, 166 (Tex. 1968)). The Acknowledgment signed by Balderas clearly refers to the Mutual Agreement to Arbitrate. *See In re Bank One, N.A.*, 216 S.W.3d 825, 826 (Tex. 2007) (per curiam) (orig. proceeding) (arbitration agreement incorporated by reference on account signature card stating "Customer acknowledges receipt of the Bank's Account Rules and Regulations including all applicable inserts and agrees to be bound by the

agreements and terms contained therein"); *In re D. Wilson Constr. Co.*, 196 S.W.3d 774, 781 (Tex. 2006) (orig. proceeding) (arbitration terms validly incorporated into construction contract signed by school district).

To prove notice of the arbitration agreement, MiCocina relies on the Acknowledgment signed by Balderas. The Acknowledgment states that Balderas received a copy of the Mutual Agreement to Arbitrate, thus indicating he had notice of the arbitration agreement. *See Dallas Peterbilt*, 196 S.W.3d at 162–63 (signed acknowledgment of receipt of summary of arbitration plan gave employee notice of arbitration agreement, despite his claim he did not receive summary). In contrast, this Court concluded in *Big Bass Towing Co. v. Akin*, 409 S.W.3d 835 (Tex. App.—Dallas 2013, no pet.), that an employer failed to prove notice where the benefit plan the employee received and accepted did not mention or refer to the separate arbitration agreement and there was no other evidence of notice of the arbitration agreement. *Id*. at 840–41. Here, however, the signed Acknowledgment specifically identifies the Mutual Agreement to Arbitrate and is evidence of notice.

It is undisputed that Balderas signed the Acknowledgment and went to work for MiCocina. Absent a defense to the Acknowledgment, this evidence is sufficient to show a valid agreement to arbitrate. *Dallas Peterbilt*, 196 S.W.3d at 163 (by signing acknowledgment form and commencing employment, employee accepted arbitration agreement as a matter of law); *Halliburton*, 80 S.W.3d at 568; *ReadyOne Indus., Inc. v. Flores*, 460 S.W.3d 656, 660 (Tex. App.—El Paso 2014, pet. denied) (written arbitration agreement and signed acknowledgment of receipt of agreement were sufficient to satisfy employer's burden to show existence of valid agreement to arbitrate). Accordingly, MiCocina met its initial burden of establishing a valid agreement to arbitrate with Balderas.

Because MiCocina met its burden, the burden shifted to Balderas to prove a defense to

enforcement of the otherwise valid arbitration agreement. *FirstMerit Bank*, 52 S.W.3d at 756; *Sidley Austin*, 327 S.W.3d at 863. Balderas raised the defenses of procedural unconscionability, asserting he was tricked and fraudulently induced into signing the Acknowledgment, and that the Mutual Agreement to Arbitrate is illusory.

B. Arbitrability of Defenses

As a preliminary matter, MiCocina argues that the Mutual Agreement to Arbitrate delegates the validity of Balderas's defenses to the arbitrator for determination. We disagree. While the parties may agree to delegate certain gateway matters to the arbitrator that normally are determined by the court, they must do so with clear and unmistakable language. *See Roe v. Ladymon*, 318 S.W.3d 502, 513–14 (Tex. App.—Dallas 2010, no pet.). The Mutual Agreement to Arbitrate provides, "Any question as to the arbitrability of any particular claim shall be arbitrated pursuant to the procedures set forth in this Agreement." This language does not indicate the parties agreed to submit matters of validity and enforcement of the agreement to the arbitrator. Rather, it refers to the scope of the arbitration agreement, i.e., the "arbitrability of any particular claim," not to the validity and enforceability of the arbitration agreement itself. We conclude the language does not clearly and unmistakably delegate the matter of validity and enforceability to the arbitrator. *See In re Weekley Homes*, 180 S.W.3d 127, 130 (Tex. 2005) (orig. proceeding) ("Under the FAA, absent unmistakable evidence that the parties intended the contrary, it is the courts rather than arbitrators that must decide 'gateway matters' such as whether a valid arbitration agreement exists."); *Firstlight Fed. Credit Union v. Loya*, 478 S.W.3d 157, 165 (Tex. App.—El Paso 2015, no pet.) (noting that scope of arbitration agreement is separate issue from its validity and enforceability). Accordingly, we will address the issue of the validity and enforceability of the Mutual Agreement to Arbitrate.

C. Procedural Unconscionability and Fraudulent Inducement

Unconscionable contracts are not enforceable under Texas Law. *In re Poly-Am., L.P.*, 262 S.W.3d 337, 348 (Tex. 2008) (orig. proceeding). Unconscionability is not subject to precise definition and is determined in light of a variety of factors. *Id.* It has two aspects: (1) procedural unconscionability, which refers to the circumstances surrounding the adoption of the arbitration provision, and (2) substantive unconscionability, which refers to the fairness of the arbitration provision itself, *see Halliburton*, 80 S.W.3d at 571. Procedural unconscionability relates to the making or inducement of the contract, focusing on the facts surrounding the bargaining process. *TMI, Inc. v. Brooks*, 225 S.W.3d 783, 792 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

Fraudulent inducement requires proof (1) of a material representation that was false; (2) the representation was known to be false when made or was made without knowledge of its truth; (3) the representation was intended to be and was relied upon by the other party; and (4) the other party justifiably relied on the false representation and thereby suffered injury. *See Int'l Profit Assocs., Inc.*, 274 S.W.3d 672, 678 (Tex. 2009) (orig. proceeding); *Haase v. Glazner*, 62 S.W.3d 795, 798–99 (Tex. 2001).

Seeking to avoid the effect of signing the Acknowledgment, Balderas argues it was procedurally unconscionable and fraudulently induced. He presented evidence he is illiterate in English, MiCocina knew he was illiterate, the Acknowledgment was written only in English, Rosas told him the Acknowledgment related to the restaurant policies, Rosas did not provide him with copies of the arbitration agreement or other documents, and Balderas accessed the employee website only once, but did not review the handbook.

MiCocina argues that even accepting Balderas's testimony, the record does not show he was tricked or fraudulently induced into signing the Acknowledgment.

"Absent fraud, misrepresentation, or deceit, a party is bound by the terms of the contract

he signed, regardless of whether he read it or thought it had different terms." *In re McKinney*, 167 S.W.3d 833, 835 (Tex. 2005) (per curiam) (orig. proceeding); *Estes v. Republic Nat'l Bank*, 462 S.W.2d 273, 276 (Tex. 1970) ("the general rule is that in the absence of a showing of fraud or imposition, a party's failure to read an instrument before signing it is not a ground for avoiding it"). "[A] party to an arms-length transaction is charged with the obligation of reading what he signs and, failing that, may not thereafter, without a showing of trickery or artifice, avoid the instrument on the ground that he did not know what he was signing." *Thigpen v. Locke*, 363 S.W.2d 247, 251 (Tex. 1962) (citing *Indemn. Ins. Co. of N. Am. v. W.L. Macatee & Sons*, 101 S.W.2d 553, 556–57 (Tex. 1937)). "It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained." *Upton v. Tribilcock*, 91 U.S. 45, 50 (1875); *see Nat'l Prop. Holdings, L.P. v. Westergren*, 453 S.W.3d 419, 425–26 (Tex. 2015) (per curiam) (rejecting argument that party was tricked into signing release where party did not read it because he was "in a hurry" and did not have his reading glasses). "Arbitration agreements in the employment context are not exempt from this principle." *Morales v. Sun Constructors, Inc.*, 541 F.3d 218, 222 (3rd Cir. 2008); *see McKinney*, 167 S.W.3d at 835 (party's "contention that he did not understand his signature's significance does not negate his acceptance of the contract terms"); *EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 90 (Tex. 1996) (per curiam) (party's "failure to read the agreement does not excuse him from arbitration").

These principles also apply if a party cannot read the document because of illiteracy or language barriers. It has long been recognized that illiteracy will not relieve a party of the consequences of his contract. *Associated Emp'rs Lloyds v. Howard*, 294 S.W.2d 706, 708 (Tex. 1956); *W.L. Macatee & Sons*, 101 S.W.2d at 556–57. Absent proof of mental incapacity, a person who signs a contract is presumed to have read and understood the contract, unless he was

prevented from doing so by trick or artifice. *W.L. Macatee & Sons*, 101 S.W.2d at 557; *Vera v. N. Star Dodge Sales, Inc.*, 989 S.W.2d 13, 17–18 (Tex. App.—San Antonio 1998, no pet.); *Nguyen Ngoc Giao v. Smith & Lamm, P.C.*, 714 S.W.2d 144, 146–47 (Tex. App.—Houston [1st Dist.] 1986, no writ). If a person is unable to read a contract, it is his duty to find some reliable person to read and explain it to him before he signs it. *Jones v. Guilford Mortg. Co.*, 120 S.W.2d 1081, 1083–84 (Tex. Civ. App.—Dallas 1938, no writ); *see also W.L. Macatee & Sons*, 101 S.W.2d at 557; *Vera*, 989 S.W.2d at 17; *Nguyen Ngoc Giao*, 714 S.W.2d at 146–47; *Roberd v. First Fed. Sav. & Loan Ass'n*, 490 S.W.2d 243, 245 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.) ("Furthermore, [the bank officer] was under no duty to read the deed to appellant. A person unable to read is under a legal duty to procure some person to read and explain the document before signing it.").

Balderas relies primarily on *Delfingen US-Texas, L.P. v. Valenzuela*, 407 S.W.3d 791 (Tex. App.—El Paso 2013, no pet.). The employee in that case, Valenzuela, could speak and read only Spanish, but signed several employment documents written only in English, including an arbitration agreement. *Id*. at 794. She testified that the employer's representative said she would explain the important documents in Spanish, but never mentioned the arbitration agreement. *Id*. at 801. Valenzuela testified the representative explained the attendance and production policies and admitted on cross-examination that other policies were explained at the meeting. *Id*. at 796. Valenzuela believed she was signing the attendance policy when she signed the arbitration agreement. *Id*. The court of appeals upheld the trial court's denial of a motion to compel arbitration, concluding there was evidence the employer affirmatively misrepresented the arbitration agreement was an attendance policy. *Id*. at 803 (concluding evidence supported implied findings that employer represented it would translate important parts of documents, did not discuss or explain arbitration agreement, and affirmatively mislead employee about nature

and significance of arbitration agreement).

While some facts in *Delfingen* are similar, there was evidence in that case the employer affirmatively misrepresented the arbitration agreement signed by the plaintiff was the company's attendance policy. *See Delfingen*, 407 S.W.3d at 803. This affirmative misrepresentation was controlling in the court of appeals's decision. *Id*. at 801 (noting that "[s]tanding alone, Valenzuela's illiteracy in English is insufficient to establish that the Agreement is unconscionable"). Here, there is no evidence MiCocina affirmatively misrepresented the nature of the Acknowledgment.

Balderas did not explain how Rosas tricked him, nor did he testify that Rosas prevented him from reading the Acknowledgment or having it read to him. According to Balderas, Rosas told him the Acknowledgment was the "restaurant's policies" and it was related to work. Those statements were true and not misleading. There is no evidence that the Acknowledgment or the Mutual Agreement to Arbitrate were not restaurant policies. The Acknowledgment identified several documents, including the Mutual Agreement to Arbitrate and the company handbook. It stated that Balderas understood the policies contained in the handbook and agreed to abide by them. Thus, the Acknowledgment was related to the "restaurant's policies."

We cannot agree that a representation that a document acknowledging receipt of the company handbook and arbitration agreement is a company policy amounts to a misrepresentation of fact sufficient to relieve a party of the consequences of signing that document. Without evidence of a false material representation, Balderas failed to establish an essential element of his fraudulent inducement defense. *See Westergren*, 453 S.W.3d at 423; *Flores*, 460 S.W.3d at 666 (affidavit that employee was misled to believe document was not important, was not told he was giving up important rights, and did not know he signed arbitration agreement failed to establish that employer "made a material representation that was false").

Balderas maintains that MiCocina had a duty to disclose the arbitration agreement because of a special relationship. A failure to disclose information is not fraudulent unless one has an affirmative duty to disclose, such as where a confidential or fiduciary relationship exists. *Tempo Tamers, Inc. v. Crow–Houston Four, Ltd.*, 715 S.W.2d 658, 669 (Tex. App.—Dallas 1986, writ ref'd n.r.e.). However, the supreme court has not found the employment relationship is a special relationship. *See City of Midland v. O'Bryant*, 18 S.W.3d 209, 216 (Tex. 2000) (holding employer-employee relationship is not a special relationship requiring imposition of duty of good faith and fair dealing). Further, the supreme court has found arbitration agreements valid in at-will employment even when there was evidence the employee did not know of or understand the provision. *See Halliburton*, 80 S.W.3d at 568–69 (holding an arbitration clause was accepted despite employee's claim that he did not understand it); *EZ Pawn*, 934 S.W.2d at 90 (although employee testified he never actually read the agreement and did not understand its effect, court held his "failure to read the agreement does not excuse him from arbitration"). In addition, Balderas's English illiteracy does not create a confidential relationship. "The fact that appellants may not be fluent in English did not of itself create such a confidential relationship as to relieve them from their duty to read the contract documents." *Salinas v. Beaudrie*, 960 S.W.2d 314, 320 (Tex. App.—Corpus Christi 1997, no writ).

The supreme court has upheld arbitration agreements even where there was conflicting evidence about whether the objecting party read the provision or knew it was there. *See Dallas Peterbilt*, 196 S.W.3d at 163 (employee claimed he never received summary of arbitration plan, but signed an acknowledgment to the contrary); *In re Palm Habor Homes, Inc.*, 195 S.W.3d 672, 675–76, 679 (Tex. 2006) (orig. proceeding) (purchasers' claims that they were unaware of arbitration provision, it was never explained to them, and they were unsophisticated and did not understand what arbitration entailed, "fail[ed] to establish procedural unconscionability as to

adoption of the arbitration agreement"); *McKinney*, 167 S.W.3d at 834–35 (party testified he did not intend to arbitrate and signed form incorporating arbitration clause intending only to change the account name and open margin account); *Halliburton*, 80 S.W.3d at 568–69; *EZ Pawn*, 934 S.W.2d at 90. Absent a duty to disclose, an agreement is not unconscionable merely because one party was not informed of the arbitration clause. *See Emerald Tex., Inc. v. Peel*, 920 S.W.2d 398, 402 (Tex. App.—Houston [1st Dist.] 1996, no writ). "A party who signs a contract containing an arbitration provision does not have to be told about the provision, but is presumed to know the contents of the contract." *In re H.E. Butt Grocery Co.*, 17 S.W.3d 360, 372 (Tex. App.—Houston [14th Dist.] 2000, orig. proceeding).

Moreover, Balderas's argument and the opinion in *Delfingen* presume that arbitration agreements must be treated differently than other terms of a contract. We do not agree that a party has a general duty to explain, discuss, or translate an arbitration agreement merely because the subject matter concerns arbitration. "In determining the arbitration agreement's validity then, a court may not construe the agreement differently from how it would construe contracts generally under state law, nor may a court rely on the uniqueness of an arbitration agreement as a basis for a state-law holding that enforcement would be unconscionable." *Venture Cotton Co-op v. Freeman*, 435 S.W.3d 222, 227 (Tex. 2014). Because parties generally are bound by the terms of contracts they sign even if they did not read or were unaware of those terms, parties are likewise bound by arbitration terms in contracts they sign. *See McKinney*, 167 S.W.3d at 835. It matters not that the specific term involved is an arbitration term—indeed, Congress intended the FAA to reverse the longstanding judicial hostility to arbitration agreements. *Venture Cotton*, 435 S.W.3d at 227. To the extent Balderas contends some additional specific notice was required because the agreement concerned arbitration, we reject that contention. Balderas was told the Acknowledgment represented restaurant policies and he willingly signed it in order to go to

work. He cannot now say he is not bound by the arbitration agreement that was specifically identified in the Acknowledgment he signed.

While we defer to the trial court's resolution of factual controversies when they are supported by evidence, we review legal determinations de novo. *Labatt Food Serv.*, 279 S.W.3d at 643. The law requires that a party is bound by an instrument he signs absent fraud, trickery, or deceit. *See McKinney*, 167 S.W.3d at 835; *W.L. Macatee & Sons*, 101 S.W.2d at 557; *Vera*, 989 S.W.2d at 17; *Nguyen Ngoc Giao*, 714 S.W.2d at 146–47. The trial court could have accepted Balderas's testimony. However, that testimony does not show he relied on any false material representation or was tricked when he signed the Acknowledgment. It is unusual that MiCocina translated the Mutual Agreement to Arbitrate, summary plan description, and handbook into Spanish, but not the one-page Acknowledgment form. *See Flores*, 460 S.W.3d at 660, 662 (employee signed document written in Spanish acknowledging receipt of arbitration agreement). However, on this record, there is no evidence of a fraudulent misrepresentation or trickery that would relieve Balderas of the consequences of failing to read or have read to him a document he voluntarily signed. In light of the obligation an illiterate party has to have a document read to them before they sign it and the lack of evidence of a fraudulent misrepresentation or trickery, we conclude Balderas is bound by his signature on the Acknowledgment. Accordingly, Balderas failed to prove procedural unconscionability and fraudulent inducement.

D. Illusory Contract

MiCocina contends Balderas failed to establish the Mutual Agreement to Arbitrate is illusory and unenforceable. Balderas argues that the Acknowledgment states the "Company reserves the right to change, rescind and add to the policies, practices and rules contained in this Handbook" and therefore MiCocina could avoid arbitration by rescinding the arbitration agreement, making any promise to arbitrate illusory. *See In re 24R, Inc.*, 324 S.W.3d 564, 565–

66 (Tex. 2010) (per curiam) (orig. proceeding) ("When illusory promises are all that support a purported bilateral contract, there is no mutuality of obligation, and therefore, no contract.").

Although the Acknowledgment contains broad language allowing the company to change the policies contained in the handbook, the Mutual Agreement to Arbitrate contains a specific provision stating: "Company shall have the right to prospectively terminate this Agreement. Termination is not effective for Covered Claims which accrued or occurred prior to the date of the termination. Termination is also not effective until ten (10) days after reasonable notice is given to Claimant."

The supreme court has held that the right to terminate an arbitration provision does not render the agreement illusory if termination is prospective and does not permit the party to avoid arbitration of existing claims. *See Halliburton*, 80 S.W.3d at 570. In *Halliburton*, an employer explicitly reserved the right to unilaterally modify or discontinue the dispute resolution program. *Id*. at 569–70. However, the supreme court held that because the policy contained a "savings clause"—including a ten-day notice provision and a provision that any amendments would only apply prospectively—that prevented the employer from avoiding its promise, the arbitration agreement was not illusory. *Id.* at 570. The Mutual Agreement to Arbitrate contains an almost identical saving clause, providing that termination is prospective and not effective for accrued claims or until ten days after reasonable notice of termination. *See In re Odyssey Healthcare, Inc.*, 310 S.W.3d 419, 424 (Tex. 2010) (per curiam) (orig. proceeding) (arbitration provision was not illusory where termination clause was prospective and required notice before it was effective).

The specific termination provision of the Mutual Agreement to Arbitrate controls over the general terms of the Acknowledgment permitting the employer to change the policies at any time. *See In re AdvancePCS Health L.P.*, 172 S.W.3d 603, 606 n.3 (Tex. 2005) (per curiam)

(orig. proceeding) (specific provision controls over more general provision to extent of any conflict (citing *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 133–34 (Tex. 1994))). We conclude the arbitration agreement is not illusory.

CONCLUSION

MiCocina met its burden to show a valid arbitration agreement and that Balderas's claims are within the scope of that agreement. On this record, Balderas failed to establish that he was tricked or fraudulently induced into signing the Acknowledgment, which incorporated the Mutual Agreement to Arbitrate, or that the Mutual Agreement to Arbitrate is illusory. Therefore, Balderas failed to establish his defenses to arbitration. Accordingly, the trial court abused its discretion by denying the motion to compel arbitration. We reverse the trial court's order and remand this case with instructions to grant the motion to compel arbitration.

/Craig Stoddart/
CRAIG STODDART
JUSTICE

161507F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

MICOCINA, LTD. D/B/A TACO DINER,
Appellant

No. 05-16-01507-CV V.

JOSE BALDERAS-VILLANUEVA,
Appellee

On Appeal from the 95th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-16-06096.
Opinion delivered by Justice Stoddart.
Justices Lang and Myers participating.

In accordance with this Court's opinion of this date, the trial court's December 22, 2016 order denying motion to abate and motion to compel arbitration is **REVERSED** and this cause is **REMANDED** to the trial court with instructions to grant appellant's motion to abate and motion to compel arbitration.

It is **ORDERED** that appellant MICOCINA, LTD. D/B/A TACO DINER recover its costs of this appeal from appellee JOSE BALDERAS-VILLANUEVA.

Judgment entered this 27th day of October, 2017.