Affirmed and Majority and Dissenting Opinions filed August 16, 2022.

In The

Fourteenth Court of Appeals

NO. 14-21-00431-CV

LENNAR HOMES OF TEXAS INC.; LENNAR HOMES OF TEXAS LAND AND CONSTRUCTION, LTD.; LENNAR HOMES OF TEXAS SALES AND MARKETING, LTD., Appellants

V.

MOHAMMAD RAFIEI, Appellee

On Appeal from the 80th District Court
Harris County, Texas
Trial Court Cause No. 2021-11954

D I S S E N T I N G O P I N I O N

The dispositive issue before us is whether a clause in an arbitration agreement delegating to the arbitrator threshold questions of arbitrability is unconscionably cost-prohibitive to appellee Rafiei. The court concludes that it is. I am unable to agree, because Rafiei has not established with evidence that the delegation provision imposes such an excessive cost under the relevant factors that it prevents him from resolving threshold issues or pursuing his personal injury

claim in the arbitral forum as he agreed. The court's opinion not only conflicts with existing precedent from the Texas Supreme Court and this court on similar issues, but it brings our court into direct conflict with the First Court of Appeals on an identical question. I would reverse the trial court's order denying arbitration and remand this case with instructions to order the parties to arbitration and stay the underlying case pending the outcome of the arbitration.

I.

Appellants moved to compel Rafiei's claims to arbitration and to abate the court proceedings. Appellants attached a copy of the agreement containing arbitration provisions and showed that Rafiei's personal injury claims are within the arbitration agreement's scope. Those matters are not disputed. Based on the arbitration agreement, appellants argued among other things that Rafiei consented to submit to an arbitrator any and all questions relating to issues of validity or enforceability of the agreement. Rafiei does not dispute that the agreement contains such a provision; however, in response to the motion to compel, he asserted that the delegation provision is unconscionable because it would force him to spend $7,675 "just to get a single ruling on a threshold question." He claimed he does not have $7,675 to spend. In denying appellants' motion, the trial court impliedly agreed with Rafiei. In their first issue, appellants challenge the trial court's implied ruling that the delegation provision is unconscionably cost-prohibitive. Because I agree with appellants, and because the answer to that question is dispositive of this appeal, I confine my dissent to that issue.

II.

Arbitration costs may be unconscionable if they preclude a litigant from effectively vindicating his or her rights in the arbitral forum. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000). The party opposing the

arbitration bears the burden to show that the costs of arbitration render it unconscionable. *In re Olshan Found. Repair Co.*, 328 S.W.3d 883, 893 (Tex. 2010) (orig. proceeding); *Herd v. Dorgan*, No. 14-19-00926-CV, 2022 WL 2517119, at *7 (Tex. App.—Houston [14th Dist.] July 7, 2022, no pet. h.) (mem. op.). To discharge that burden, the opponent must present evidence on the following factors: (1) the party's ability to pay the arbitration fees and costs; (2) the actual cost of arbitration compared to the amount of damages sought; and (3) the expected cost differential between arbitration and litigation in court and whether that cost differential is so substantial as to deter the bringing of claims. *See Olshan Found. Repair*, 328 S.W.3d at 893-95. Among these factors, a comparison of the total costs of the two forums is the most important. *Id.* at 894-95.

Certain principles guide us in determining whether a party opposing arbitration has met his or her evidentiary burden. First, the opponent must offer evidence of expected costs likely to be incurred in resolving the particular claim at issue in the arbitral forum, such as through invoices, expert testimony, reliable cost estimates, and affidavits. *See id.* at 895. A showing of the actual cost to be incurred is key because the likely arbitration cost is relevant to all of the factors. Speculation about possible costs, or evidence of the "risk" of possible costs, is insufficient to establish unconscionability. *See id.*; *Venture Cotton Co-op. v. Freeman*, 435 S.W.3d 222, 232 (Tex. 2014); *Herd*, 2022 WL 2517119, at *7-8; *In re MHI P'ship, Ltd.*, No. 14-07-00851-CV, 2008 WL 2262157, at *6 (Tex. App.—Houston [14th Dist.] May 29, 2008, orig. proceeding) (mem. op.). Rather, both the United States Supreme Court and the Supreme Court of Texas require "specific evidence that a party will actually be charged excessive arbitration fees" in that party's "particular case." *Olshan Found. Repair*, 328 S.W.3d at 895; *see TMI, Inc.*

v. Brooks, 225 S.W.3d 783, 797 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (homeowners presented no evidence that they would actually be charged the fees they identified). And the amount of likely costs must be in such an amount as to demonstrate that the arbitral forum is not an adequate and accessible substitute to litigation.

Additionally, the party opposing arbitration may not merely "'assume the most expensive possible scenario.'" *Olshan Found. Repair*, 328 S.W.3d at 897 (quoting *MHI P'ship*, 2008 WL 2262157, at *7); *see TMI, Inc.*, 225 S.W.3d at 797. Nor may the party rely on evidence showing the amounts incurred in arbitration by other claimants absent a reliable showing that the amounts incurred in other cases relate to claims similar in amount or difficulty as the claims at issue. *See Olshan Found. Repair*, 328 S.W.3d at 897 ("Merely showing that other claimants have incurred arbitration costs of some amount falls well short of specific evidence that these particular parties will be charged excessive fees.").

III.

The particular issue at hand is whether the delegation provision is cost prohibitive to Rafiei. The First Court of Appeals recently addressed that very question in *Taylor Morrison of Texas, Inc. v. Skufca*, No. 01-20-00638-CV, — S.W.3d —, 2021 WL 6138979 (Tex. App.—Houston [1st Dist.] Dec. 30, 2021, no pet.). There, two homeowners signed an arbitration agreement containing a provision delegating to the arbitrator the authority to determine gateway issues of arbitrability, including enforceability of the arbitration agreement. *Id.* at *1. After the homeowners sued their builder, the builder moved to compel arbitration, which the trial court effectively denied. *Id.* On appeal, one of the issues was the Skufcas' argument "that they should not be required to pay what they termed 'exorbitant costs' to arbitrate threshold issues of enforceability under the delegation

provision." *Id.* at *14. The court of appeals ultimately concluded that the Skufcas did not meet their burden to show that the cost of arbitrating threshold issues rendered the delegation provision substantively unconscionable because (1) the Skufcas offered evidence only regarding the costs of conducting the entire merits-based arbitration and not of the cost to arbitrate threshold issues, such as enforceability and (2) the Skufcas offered no evidence of their ability to pay. *Id.* at *16.

Accordingly, the court held that the trial court abused its discretion by effectively denying the appellants' motion to compel arbitration of gateway issues of arbitrability. *Id.* at *17. The court reversed the order and remanded to the trial court for the court to sign an order compelling the parties to arbitrate pursuant to the delegation clause and staying the proceedings. *Id.* The First Court of Appeals subsequently followed *Skufca* in *Taylor Morrison of Texas, Inc. v. Caballero*, No. 01-20-00800-CV, 2022 WL 839429 (Tex. App.—Houston [1st Dist.] Mar. 22, 2022, no pet.) (mem. op.); and *Taylor Morrison of Texas, Inc. v. Goff*, No. 01-21-00404-CV, 2022 WL 1085714 (Tex. App.—Houston [1st Dist.] Apr. 12, 2022, no pet.) (mem. op.). These cases are the only Texas cases I have found addressing the precise question presented here; but the majority opinion does not address them.

I agree with the First Court and would hold that Rafiei's evidentiary showing in the trial court was insufficient to demonstrate that the delegation clause is substantively unconscionable. As evidence, Rafiei offered his own affidavit, the affidavit of David B. Joeckel, Jr., and the administrative fee schedules of the construction industry arbitration rules and mediation procedures.

According to Rafiei's affidavit, he has $6,000 in net "disposable" income every month, after deducting all living expenses for himself and his family from his gross monthly income. That amounts to $72,000 per year at his self-described

disposal. It is undisputed that Rafiei seeks at least $1 million in actual damages, plus punitive damages. Rafiei argued in his response that, if he is compelled to arbitrate the threshold issue of the delegation clause's arbitrability, he will have to pay at least $7,675. This amount is comprised of a $7,000 initial arbitration filing fee, plus Rafiei's share of an expected one-hour hearing before a three-arbitrator panel ($675). He claims this is an amount of "money which he does not have." Rafiei argued that the delegation provision is unconscionable because it forces him to pay "exorbitant" arbitration costs just to resolve a threshold question.

I conclude Rafiei has failed to meet his burden for several reasons. First, neither Rafiei's affidavit nor Joeckel's affidavit establishes the actual amount of costs Rafiei is likely to incur to have the threshold arbitrability question decided in the arbitral forum. Joeckel, for instance, does not opine on that question, but rather discusses his experience with the total cost of arbitrating "comparable" cases on the merits. Rafiei's affidavit does not speak to the relevant question at all.

Indeed, neither affidavit offers any facts regarding the costs to litigate the same question in the state court system. We have no evidence of the nature of Rafiei's agreement with his attorneys, including whether counsel has agreed or not agreed to front litigation costs with the expectation to obtain reimbursement out of a potential recovery exceeding $1 million. There is no evidence that Rafiei is obligated to pay court and litigation expenses as the case progresses, the amount of any such expenses, or that he cannot pay them. The absence of any evidence of court litigation costs he has incurred or will incur unsurprisingly forecloses discussion (and Joeckel engages in none) on the "most important" factor—a comparison of total costs of the two forums on the question to be arbitrated,

namely, the unconscionability of the delegation clause. *See Olshan Found. Repair*, 328 S.W.3d at 894-95; *Skufca*, 2021 WL 6138979, at *16.[1]

Moreover, Rafiei's counsel's $7,675 estimate impermissibly presumes the "most expensive scenario" because it assumes that Rafiei will have to pay the highest initial filing fee and that three arbitrators will be required. Both of those assumptions are speculative. Rafiei has several options to seek a reduced or deferred filing fee, and he has not shown that he has explored any of them. For example, Rafiei does not explain why the $7,000 initial filing fee for his $1 million claim will apply to an arbitral determination that is limited only to the unconscionability of the delegation clause. The initial filing fee for "nonmonetary claims" is $3,250 under the standard fee schedule; and it is only $2,000 under the "flexible" schedule. Even assuming the filing fee for a $1 million claim applies, the initial filing fee for such a claim under the flexible schedule is $3,500. Further, the payment of the initial fee can be deferred upon request in cases of extreme hardship. *See* AAA Construction Industry Arbitration Rule 55. Rafiei's evidence fails to address why any of these options for a reduced or deferred filing fee is unavailable to him. And, even presuming Rafiei is correct that he will have to pay an initial filing fee of $7,000, Joeckel notably does not state that he considers an initial filing fee in that amount to be unconscionable.[2] Further assuming Rafiei will in fact owe $7,675 to resolve the threshold issue in arbitration, the fact that he

[1] "[T]o show that the cost of arbitration rendered the delegation provision unconscionable, the Skufcas needed to demonstrate the unfairness of the cost of arbitrating the threshold issues of arbitrability and enforceability under the delegation provision, not the cost of arbitrating the merits of their claims to an award under the arbitration agreement." *Skufca*, 2021 WL 6138979, at *16.

[2] The amount of administrative fees, incidentally, is a function of the amount of damages claimed, which Rafiei alone controls.

is seeking $1 million in actual damages, plus punitive damages, does not weigh in favor of his unconscionability argument.

Nor has Rafiei shown that three arbitrators will necessarily be required, though this issue affects only a small portion of his claimed cost. To be sure, the arbitration agreement mandates three arbitrators for damage claims exceeding $250,000 or including claims for punitive damages, such as Rafiei seeks. But the parties can agree to only one arbitrator for those claims. Rafiei has not offered any evidence that he has requested or been refused the option to arbitrate the threshold question with only one arbitrator.

Rafiei's assumptions that the most expensive options are the only ones available are not sufficient to justify the trial court's order. *E.g.*, *Olshan Found. Repair*, 328 S.W.3d at 897; *MHI P'ship*, 2008 WL 2262157, at *7; *see TMI, Inc.*, 225 S.W.3d at 797.

Rafiei relies on Joeckel's estimates of arbitration costs for cases comparable to his. Aside from the fact that Joeckel does not address the cost of arbitrating only the threshold question but rather discusses what he believes to be a fair estimate to arbitrate the merits, Joeckel speaks in generalities and does not identify any details of Rafiei's case establishing that the cost of pursuing his particular claim is likely to be similar to the estimates he describes. For example, there is no evidence of the nature of Rafiei's injury, how many witnesses (including doctors) he expects to present, or how long it will take him to present his case. Joeckel offers a range of two-to-five days, but there exists no factual support for why it is reasonable or likely to expect Rafiei's case will take up to five days to present.

Rafiei's evidence falls short on other relevant considerations, including his ability to pay the expected arbitration fees and costs. *See Olshan Found. Repair*, 328 S.W.3d at 893-95. Again, presuming he must pay $7,675 to arbitrate the

unconscionability of the delegation clause, his conclusory protestation that he does "not have that kind of money" is belied by his own testimony. According to his affidavit, Rafiei has $6,000 per month at his disposal, and he offered no evidence whether he has any additional savings available. He does not explain, factually, why he cannot pay $7,675, given his $72,000 annual disposable income. Rafiei simply has not proven that the cost he expects to incur is such a substantial burden to him that he is unable to vindicate his rights in the arbitral forum. The entire final paragraph of his affidavit—quoted by the majority—is conclusory and speculative.

Because Rafiei has not met his evidentiary burden as to any of the relevant factors, we must reject his claim that the delegation clause is substantively unconscionable because it is cost prohibitive. *E.g.*, *Olshan Found. Repair*, 328 S.W.3d at 896-97; *Herd*, 2022 WL 2517119, at *7-8; *MHI P'ship*, 2008 WL 2262157, at *6; *Skufca*, 2021 WL 6138979, at *16-17; *Darling Homes of Tex., LLC v. Khoury*, No. 01-20-00395-CV, 2021 WL 1918772, at *10 (Tex. App.—Houston [1st Dist.] May 13, 2021, no pet.) (mem. op.). Because the majority does not do so, I dissent.

The majority opinion cites *In re Poly-America, L.P.*, 262 S.W.3d 337, 348 (Tex. 2008) (orig. proceeding), but that case does not support the result here. The claimant's evidence in *Poly-America* included: (1) an expert witness providing *detailed* estimates of the *likely* cost of arbitration in the *claimant's* case; (2) how the claimant's expected share of arbitration costs under the agreement's capped fee-splitting provision compared to his monthly salary of $3,300; (3) that if he had to pay the expected cost to have his claim determined, given his salary, he would be unable to pursue his claim against the company unless he could find an attorney willing to pay those fees; and (4) he had attempted to retain two attorneys, but they

had refused to represent him on a contingent-fee basis because of the arbitration agreement. *Id.* at 354-55. Here, Rafiei's evidence plainly does not compare favorably to the evidence in *Poly-America*.

I would reverse the trial court's order denying arbitration and remand this case with instructions to order the parties to arbitration and stay the underlying case pending the outcome of the arbitration.

/s/ Kevin Jewell
Justice

Panel consists of Justices Jewell, Zimmerer, and Hassan. (Zimmerer, J., majority)