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

MAJORITY OPINION

Appellants Lennar Homes of Texas, Inc., Lennar Homes of Texas Land and Construction, Ltd., and Lennar Homes of Texas Sales and Marketing, Ltd. (collectively "Lennar Homes") appeal the trial court's interlocutory order denying their motion to compel arbitration. Lennar Homes argues that appellee Mohammad Rafiei failed to establish the affirmative defense of unconscionability. Because the trial court could have concluded that the arbitration agreement and the

delegation clause within the arbitration agreement were both unconscionable, we overrule Lennar Homes' issues on appeal and affirm the trial court's order.

BACKGROUND

Rafiei and his wife bought a house from Lennar Homes in 2018. The sales contract for the house contained an arbitration provision in section 14, entitled "Mediation/Arbitration of Disputes." It provides, in pertinent part:

> 14.1 Dispute Resolution. The parties to this Agreement specifically agree that it is their desire to efficiently and quickly resolve any disputes that arise, that this transaction involves interstate commerce, and that any Dispute (as hereinafter defined) shall first be submitted to mediation and, if not settled during mediation, shall thereafter be submitted to binding arbitration as provided by the Federal Arbitration Act (9 U.S.C. §§1 et seq.) and not by or in a court of law or equity. "Disputes" (whether contract, warranty, tort, statutory or otherwise), shall include, but are not limited to, any and all controversies, disputes or claims: (1) arising under, or related to this Agreement, the Home, the Community or any dealings between Buyer and Seller; (2) arising by virtue of any representations, promises or warranties alleged to have been made by Seller or Seller's representative; (3) relating to personal injury or property damage alleged to have been sustained by Buyer, Buyer's children or other occupants of the Home, or in the Community; or (4) relating to issues of formation, validity or enforceability of this Section.
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> 14.3 Arbitration. If the Dispute is not fully resolved in mediation, the Dispute shall be submitted to binding arbitration and administered by the AAA[1] in accordance with the AAA's Construction Industry Arbitration Rules. . . . The decision of the arbitrator(s) shall be final and binding on both parties. Any judgment upon the award rendered by the arbitrator may be entered in and enforced by any court having jurisdiction over such Dispute. If the claimed amount exceeds $250,000 or includes a demand for punitive damages, the Dispute shall be heard and determined by three

[1] American Arbitration Association.

> arbitrators; however, if mutually agreed to by the parties, then the Dispute shall be heard and determined by one arbitrator. All decisions respecting the arbitrability of any Dispute shall be heard and determined by the arbitrator(s). . . . Unless otherwise recoverable by law or statute, each party shall bear its own costs and expenses, including attorneys' fees and paraprofessional fees, for any mediation and arbitration. Notwithstanding the foregoing, if a party unsuccessfully contests the validity or scope of arbitration in a court of law or equity, the non-contesting party shall be awarded reasonable attorneys' fees, paraprofessional fees and expenses incurred in defending such contest, including such fees and costs associated with any appellate proceedings. In addition, if a party fails to abide by the terms of a mediation settlement or arbitration award, the other party shall be awarded reasonable attorneys' fees, paraprofessional fees and expenses incurred in enforcing such settlement or award.

According to Rafiei, approximately three years after he bought the house, he turned on a garbage disposal and the disposal exploded. Rafiei asserts that he was severely injured by the explosion. Rafiei filed suit against Lennar Homes alleging different causes of action seeking to recover damages for the injuries he allegedly sustained in the disposal explosion. Rafiei sought "monetary relief in excess of $1,000,000," plus punitive damages.

Lennar Homes filed an answer to Rafiei's lawsuit. Soon thereafter, Lennar Homes filed a motion to compel arbitration and to abate the trial court's proceedings.[2] Lennar Homes attached several exhibits to the motion, including the

[2] The record does not indicate whether the parties mediated the dispute. Neither party mentioned the mediation requirement in the trial court, nor do they address it on appeal. Even if the issue had been raised, it is well-settled that any dispute over whether the mediation requirement was a precondition that had to occur before seeking arbitration must be resolved by the arbitrator(s) unless the arbitration clause and delegation clause are unenforceable. *See G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 521 (Tex. 2015) (stating that courts generally presume that the parties "intend arbitrators, not courts, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration."). Additionally, when an "agreement requires the parties to mediate before arbitration, a party who proceeds first to litigation waives the right to mediation and cannot assert the mediation provision as a condition precedent to arbitration." *Rodriguez v. Texas Leaguer Brewing Co.*,

AAA's construction industry arbitration rules. Rafiei filed a response which included his own affidavit, an affidavit prepared by David B. Joeckel, Jr., "a plaintiff's lawyer in Dallas-Fort Worth," and the AAA's Administrative Fee Schedules for construction-related arbitrations.

The AAA's fee schedule provides two possible fee schedules, the "Standard Fee Schedule" and the "Flexible Fee Schedule." The "Standard Fee Schedule" is a "two-payment schedule that provides for somewhat higher initial filing fees but lower overall administrative fees for cases that proceed to a hearing." The schedule states that for an arbitration where the claimed damages are between $1,000,000 and $10,000,000, the required initial filing fee is $7,000 payable when the arbitration is filed. The "Final Fee" is $7,700 and it must be paid in advance for all cases "that proceed to their first hearing."

The "Flexible Fee Schedule" is a "three-payment schedule that provides for lower initial filing fees and then spreads subsequent payments over the course of the arbitration. Total administrative fees will be somewhat higher for cases that proceed to a hearing." This schedule provides that for an arbitration where the claimed damages are between $1,000,000 and $10,000,000, the fees include an initial filing fee of $3,500 payable when the arbitration is filed, a $5,700 "Proceed Fee," and a $7,700 "Final Fee" payable when the case proceeds to a first hearing.

According to the schedule, the administrative fees do not cover the cost of a hearing room. Instead, hearing rooms "are available on a rental basis." In addition, "*[a]rbitrator compensation is not included in either schedule*." (emphasis in original) Finally, the schedule states that "unless the parties' agreement provides otherwise, arbitrator compensation and administrative fees are subject to allocation by an arbitrator in an award."

L.L.C., 586 S.W.3d 423, 430 (Tex. App.—Houston [14th Dist.] 2019, pet. denied).

In his affidavit, Joeckel explained that he is an attorney licensed in Texas since 1986 and that he has "handled hundreds of cases for injured and wronged individuals" during that time. Joeckel also stated that he has "litigated at least twenty-five cases in arbitration." Joeckel then opined

> that when cases comparable to [Rafiei's] are arbitrated in Texas, the total amount of expenses that are incurred generally average between [approximately] $60,000.00 and [approximately] $80,000.00. This includes routine case expenses seen in regular litigation (e.g., discovery costs and expert fees) which typically run [approximately] $30,000.00, as well as the addition of arbitrator's fees, which typically run between [approximately] $20,000.00 for a two-day arbitration to [approximately] $40,000.00 for a five-day arbitration. This is based on an arbitrator billing $450 an hour, which is typical for this type of case. Given the significance of these costs, I almost never see arbitration agreements that require a plaintiff to pay any more up front than the initial filing fee. When I do see arbitration agreements that require a plaintiff to pay more up front, it is my practice to challenge them as unconscionable.
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> Based upon my experience in arbitration, if Mr. Rafiei is required to arbitrate his case through AAA, the overall cost of the arbitration process would likely exceed $60,000.00. If Mr. Rafiei is required to pay fifty percent of the arbitrator's costs pursuant to the fee-splitting provision contained in the arbitration agreement defendants assert he signed, this would force Mr. Rafiei to pay up to [approximately] $20,000.00.
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> The cost potentially incurred by Mr. Rafiei in arbitration are [sic] astronomically higher compared to that which would be incurred if he continued with his claims in the public judicial forum. The out-of-pocket expenses plaintiffs face in Texas state courts are minimal. All hearings in court and trial are free to the parties. Conversely, in arbitration, every time there is a hearing on status and scheduling conferences or discovery disputes and pre-trial matters, the arbitrator's time is charged to the party responsible for payment according to the agreement. On top of that arbitrators typically spend 10 hours a day for the final hearing. According to the terms of the arbitration agreement, Mr. Rafiei would be responsible for half of these costs. As such, I believe the fee-splitting provision of the

> purported arbitration agreement is a strong deterrent to potential claimants.

Rafiei stated in his affidavit that he could not "afford to pay upfront costs related to this litigation that go beyond $6,000.00." Rafiei continued

> If it is determined that I must bring my lawsuit against Defendants in arbitration and that arbitration will require me to pay more than $6,000.00 in fees and expenses up front, I do not expect to continue with my claim because I do not have that kind of money. Similarly, if arbitration is compelled and in reasonable probability will result in expenses so significant that they will overtake the value of my net recovery, I will likely abandon my claim altogether. In other words, should arbitration be compelled in this case, the arbitration costs that I have been informed will likely result[,] will deter me from seeking to vindicate my rights in the arbitral forum. I wish to bring my case in state court for my injuries. I cannot afford to incur such a substantial debt by arbitrating my claims to recover for my personal injuries.

While Lennar Homes did file a reply to Rafiei's response to the motion to compel arbitration, it did not attach any affidavits or other evidence contradicting Rafiei's evidence on the expected cost of the arbitration and his ability to pay it.

The trial court denied Lennar Homes' motion. This interlocutory appeal followed. *See* Tex. Civ. Prac. & Rem. Code § 51.016.

ANALYSIS

In two issues on appeal Lennar Homes argues that the trial court abused its discretion when it denied Lennar Homes' motion to compel arbitration. In Lennar Homes' view, Rafiei failed to produce sufficient evidence to prove his unconscionability affirmative defense. We address these issues together.

I. Standard of Review and Applicable Law

We review a trial court's order denying a motion to compel arbitration for an

abuse of discretion. *Henry v. Cash Biz, LP*, 551 S.W.3d 111, 115 (Tex. 2018). Under this standard, we defer to a trial court's factual determinations if they are supported by evidence, but we review a trial court's legal determinations de novo. *Rodriguez*, 586 S.W.3d at 427.

Generally, a party seeking to compel arbitration must establish that a valid arbitration agreement exists and that the claims at issue fall within the scope of that agreement. *G.T. Leach Builders, LLC*, 458 S.W.3d at 524. Here, the parties agree that the Federal Arbitration Act ("FAA") applies and there is no dispute that, if a valid arbitration agreement exists, Rafiei's claims fall within its scope. "Once the arbitration movant establishes a valid arbitration agreement that encompasses the claims at issue, a trial court has no discretion to deny the motion to compel arbitration unless the opposing party proves a defense to arbitration." *Rodriguez*, 586 S.W.3d at 428 (quoting *Human Biostar, Inc. v. Celltex Therapeutics Corp.*, 514 S.W.3d 844, 848 (Tex. App.—Houston [14th Dist.] 2017, pet. denied)).

If the party seeking to compel arbitration establishes that an arbitration agreement exists, the burden then shifts to the party opposing arbitration to establish a defense to the arbitration agreement. *Venture Cotton Coop. v. Freeman*, 435 S.W.3d 222, 227 (Tex. 2014); *Berry Y&V Fabricators, LLC v. Bambace*, 604 S.W.3d 482, 485–86 (Tex. App.—Houston [14th Dist.] 2020, no pet.); *Garg v. Pham*, 485 S.W.3d 91, 102 (Tex. App.—Houston [14th Dist.] 2015, no pet.). A party may defend against the enforceability of the arbitration agreement only on grounds that exist at law or in equity for the revocation of a contract. *Berry Y&V Fabricators, LLC*, 604 S.W.3d at 486 (citing 9 U.S.C.A. § 2). One such defense is unconscionability. *See In re Olshan Found. Repair Co., LLC*, 328 S.W.3d 883, 891 (Tex. 2010) (stating that an unconscionable arbitration agreement is unenforceable). If the arbitration agreement contains a delegation

provision,[3] a party seeking to avoid arbitration must challenge both the delegation provision and the overall arbitration agreement. *Berry Y&V Fabricators, LLC,* 604 S.W.3d at 487. When a party challenges an arbitration agreement, the trial court should summarily resolve the issue based on the affidavits, pleadings, discovery, and stipulations, if any. *In re Poly-America, L.P.*, 262 S.W.3d 337, 354 (Tex. 2008) (quoting *Anglin Co. v. Tipps*, 842 S.W.2d 266, 269 (Tex. 1992)).

In this case, the trial court did not make any findings of fact or conclusions of law; nor did it specify which factual or legal ground it was relying on when it denied Lennar Homes' motion to compel arbitration. In such cases, the judgment of the trial court implies all necessary fact findings in support of the judgment and we will affirm the judgment if it can be upheld on any legal theory that finds support in the evidence. *Rodriguez,* 586 S.W.3d at 432.

II. The trial court did not abuse its discretion when it denied Lennar Homes' motion to compel arbitration.

In the trial court Rafiei argued the agreement was unconscionable because the costs of arbitrating, as required by the agreement, would be excessive and would impose an unfair financial burden on him and his family. Texas recognizes both substantive and procedural unconscionability. *Royston, Rayzor, Vickery, & Williams, LLP v. Lopez*, 467 S.W.3d 494, 499 (Tex. 2015). "Substantive unconscionability refers to the fairness of the arbitration provision itself, whereas procedural unconscionability refers to the circumstances surrounding adoption of the arbitration provision." *In re Palm Harbor Homes, Inc.*, 195 S.W.3d 672, 677 (Tex. 2006). Only substantive unconscionability is at issue here. "The test for substantive unconscionability is whether, 'given the parties' general commercial

[3] "A delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement." *Berry Y&V Fabricators, LLC,* 604 S.W.3d at 487 (internal quotation marks omitted).

background and the commercial needs of the particular trade or case, the clause involved is so one-sided that it is unconscionable under the circumstances existing when the parties made the contract.'" *In re Weeks Marine, Inc.*, 242 S.W.3d 849, 859 (Tex. App.—Houston [14th Dist.], 2007, orig. proceeding) (quoting *In re Firstmerit Bank, N.A.*, 52 S.W.3d 749, 757 (Tex. 2001) (orig. proceeding)).

The party opposing arbitration because of excessive costs has the burden to show the costs of arbitration would be prohibitively expensive and must submit "*some evidence*" showing the likelihood of incurring such costs for the particular arbitration. *In re Poly-Am., L.P.*, 262 S.W.3d at 356 (emphasis in original). Such evidence can consist of invoices, expert testimony, reliable cost estimates, or other comparable evidence. *In re Olshan Found. Repair Co., LLC*, 328 S.W.3d at 895; *BBVA Compass Inv. Solutions, Inc. v. Brooks*, 456 S.W.3d 711, 724 (Tex. App.—Fort Worth 2015, no pet.).

The United States Supreme Court in *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 92 (2000) created a burden-shifting test in which the party seeking to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive bears the burden of showing the likelihood of incurring such costs. Once met, the burden shifts to "the party seeking arbitration [who] must come forward with contrary evidence." *Id.*; *see also In re Poly-Am.*, 262 S.W.3d at 348 ("The burden of proving such a ground—such as fraud, unconscionability or voidness under public policy—falls on the party opposing the contract.").

In determining whether the costs of arbitration are excessive, courts apply a case-by-case analysis and focus on the following factors: (1) the party's ability to pay the arbitration fees and costs; (2) the actual amount of the fees compared to the amount of the underlying claim(s); (3) the expected cost differential between

arbitration and litigation; and (4) whether that cost differential is so substantial that it would deter a party from bringing a claim. *In re Olshan Found. Repair Co.*, 328 S.W.3d at 893–94. A comparison of the total costs of the two forums, litigation and arbitration, is the most important factor. *Id*. at 894–95; *Brooks*, 456 S.W.3d at 724.

In support of his claim of unconscionability, Rafiei submitted the affidavits quoted above. Based on these affidavits, the arbitration agreement, the sales agreement, and the AAA rules and fee schedule, we find some evidence that, to proceed to a hearing on the unconscionability of the delegation provision within the arbitration agreement, Rafiei would have to pay half of the administrative fees totaling either $14,700 or $16,900, depending on which fee schedule the parties elected to proceed under. Rafiei would also have to pay half of the compensation for three arbitrators, which Joeckel opined is typically $450 each per hour served. Joeckel also opined on the comparative costs of resolving the dispute in a trial court and concluded arbitration was significantly more expensive. Assuming that resolution of the initial question whether the delegation clause is unconscionable would require only a single hour of each arbitrator's time, the total cost for three arbitrators would be $1,350. Rafiei's share of that total would be $675, for an initial payment of $8,025 to determine this initial question.[4] Rafiei stated in his affidavit that if he was required to incur more than $6,000 in fees and expenses upfront, he would not be able to continue with his claim. Lennar Homes did not offer any evidence in the trial court contradicting Rafiei's evidence.[5] We conclude

[4] However, Rule R-58 of the AAA construction industry arbitration rules provide that "the AAA may require the parties to deposit in advance of any hearings such sums of money as it deems necessary to cover the expense of the arbitration, including the arbitrator's fee, if any . . . ."

[5] Lennar Homes did include an affidavit from Shana Hightower, its Director of Customer Care. She stated that Rafiei did not communicate "any request or intent to mediate the claims alleged" in his lawsuit. She offered no evidence on the costs Rafiei might incur if the dispute was sent to arbitration.

that the trial court did not abuse its discretion when it determined that the delegation clause was unconscionable. *See In re Poly-Am.*, 262 S.W.3d at 355 (concluding court of appeals properly credited uncontroverted affidavits containing the plaintiff's and his expert's "monetary estimates" of the cost of arbitrating the dispute in holding arbitration clause unconscionable because the cost of the arbitration would preclude the plaintiff from pursuing his lawsuit).

Lennar Homes' argument that Joeckel's affidavit is conclusory does not change this result. A conclusory statement is one that expresses a factual inference without providing underlying facts to support that conclusion. *Leonard v. Knight*, 551 S.W.3d 905, 911 (Tex. App.—Houston [14th Dist.] 2018, no pet.). Here, Joeckel provided the factual basis, his experience as an attorney handling claims similar to Rafiei's and his own involvement in more than two-dozen arbitrations, in support of his opinion on the expected cost of an arbitration of Rafiei's claim and a comparison of those costs with the cost of litigating the claim in a court. We conclude Joeckel's affidavit is not conclusory and it supports the trial court's implied conclusion that the delegation provision is unconscionable.

The result is the same when we turn to the arbitration agreement itself. Here, the arbitration agreement did not place a cap on the amount Rafiei would have to pay to pursue an arbitration to completion. While Lennar Homes argues on appeal that the AAA might reduce the administrative fees, it provided no evidence that the AAA had granted, or that it was considering, such a reduction. Lennar Homes also argues that Rafiei's affidavit is insufficient to establish that pursuing an arbitration to completion would deter him from pursuing his claim against Lennar Homes. Once again however, Lennar Homes offered no evidence disputing Rafiei's affidavit. Instead, Lennar Homes asserts that Rafiei had a significant asset, three years of equity in his house, that he could use to finance

pursuit of his claim in arbitration. We hold that the trial court did not abuse its discretion when it determined the arbitration agreement was unconscionable.

Arbitration is intended to be a lower cost, efficient alternative to litigation. *See In re Olshan*, 328 S.W.3d at 893. Yet the evidence in this case establishes the opposite. "Where these justifications are vanquished by excessive arbitration costs that deter individuals from bringing valid claims, the unconscionability doctrine" should protect the claimant. *See id.* The Texas Supreme Court has recognized that fee splitting of arbitration costs can have the effect of deterring potential litigants from vindicating their statutory rights in an arbitral forum. *See In re Poly-Am.*, 262 S.W.3d at 355. There is no provision in the arbitration agreement that would cap the amount Rafiei might be required to pay in the initial phase addressing the delegation clause, nor in the second stage if the dispute was submitted to the three-arbitrator panel for final resolution. Concluding the evidence in the record supports the trial court's implied conclusions that the delegation clause and the arbitration agreement itself were unconscionable, we overrule Lennar Homes' issues on appeal.

CONCLUSION

We conclude the trial court did not abuse its discretion when it denied the motion to compel arbitration and affirm the trial court's order.

/s/ Jerry Zimmerer
Justice

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