IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

TBF FINANCIAL, LLC, Respondent, v. GREGG HENDERSON and JANE DOE HENDERSON, and their marital community, Appellants.	)	No. 63699-5-I DIVISION ONE UNPUBLISHED OPINION FILED: August 2, 2010

Grosse, J. — A party who signs a contract that identifies all the enforceable terms and who does not claim that the terms were illegible at the time of signing is bound to those terms absent a showing of fraud or misrepresentation. Here, the undisputed evidence established that a customer signed a lease agreement that clearly stated that the enforceable terms included those listed on the reverse side of the agreement, signed a guaranty that personally obligated him to the owner and its assigns, and did not claim that the terms were illegible at the time he signed the agreement. Thus, the trial court properly concluded that the party to whom the lease was assigned was entitled to enforce the terms as a matter of law and permitted that party to submit a digitally enhanced version of the contract terms. Accordingly, we affirm.

FACTS

Alternative Dental Solutions (ADS) entered into an agreement to lease a copy machine supplied by Copiers Northwest, Inc. The agreement listed the lease term as 48 months with the first monthly payment due June 6, 2006. On April 20, 2006, Gregg

Henderson, managing partner of ADS, signed the agreement on behalf of ADS as the "Customer" on the agreement. He also signed the agreement as a personal guarantor, agreeing to "unconditionally and irrevocably guarantee to Owner, its successors and assigns, the prompt payment and performance of all obligations under the Agreement." A few weeks later, Wells Fargo Financial Leasing, Inc. (Wells Fargo) signed the agreement.

The agreement contained the following language above the signature lines:

> We have written this Agreement in plain language because we want you to understand its terms. Please read your copy of this agreement carefully and feel free to ask us any questions you may have. The word "Agreement" means this FlexPlan Program Agreement. The words "you" and "your" mean the Customer named above. The words "we," "us," and "our" refer to the Owner named below. The abbreviation "CNW" refers to Copiers Northwest, Inc.
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> IMPORTANT: READ BEFORE SIGNING. THE TERMS OF THIS AGREEMENT (INCLUDING THOSE ON THE REVERSE SIDE) SHOULD BE READ CAREFULLY BECAUSE ONLY THOSE TERMS IN WRITING ARE ENFORCEABLE. TERMS OF ORAL PROMISES WHICH ARE NOT CONTAINED IN THIS WRITTEN AGREEMENT MAY NOT BE LEGALLY ENFORCED. YOU MAY CHANGE THE TERMS OF THIS AGREEMENT ONLY BY ANOTHER WRITTEN AGREEMENT BETWEEN YOU AND US. YOU AGREE TO COMPLY WITH THE TERMS AND CONDITIONS OF THIS AGREEMENT. PROVIDED THAT YOU ARE NOT IN DEFAULT UNDER THE AGREEMENT, YOU WILL HAVE THE OPTION TO UPGRADE THE EQUIPMENT INTO A NEW AGREEMENT. THE BALANCE DUE ON THIS AGREEMENT WILL BE REFINANCED INTO A NEW AGREEMENT WITH SUCH BALANCE DETERMINED BY US BUT NOT TO INCLUDE AN EARLY TERMINATION PENALTY. THE UPGRADE REQUEST WILL ALSO BE SUBJECT TO YOU ACQUIRING THE NEW EQUIPMENT FROM COPIERS NORTHWEST, INC. AND SUBJECT TO OUR CREDIT APPROVAL. YOU AGREE THAT THE EQUIPMENT WILL BE USED FOR BUSINESS PURPOSES ONLY AND NOT FOR PERSONAL, FAMILY OR HOUSEHOLD PURPOSES.
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> YOU CERTIFY THAT ALL THE INFORMATION GIVEN IN THIS AGREEMENT AND YOUR APPLICATION WAS CORRECT AND COMPLETE WHEN THIS AGREEMENT WAS SIGNED. THIS AGREEMENT IS NOT BINDING UPON US OR EFFECTIVE UNTIL AND UNLESS WE EXECUTE THIS AGREEMENT. THIS AGREEMENT WILL BE GOVERNED BY THE LAWS OF THE STATE WHERE

> OWNER HAS ACCEPTED AND EXECUTED THIS AGREEMENT. YOU AGREE TO THE JURISDICTION AND VENUE OF FEDERAL AND STATE COURTS LOCATED WHERE THIS AGREEMENT IS ACCEPTED AND EXECUTED BY OWNER.
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> *ACCEPTED BY:* *CUSTOMER:*

The back of the agreement contained a number of "TERMS AND CONDITIONS" in small print.

Wells Fargo eventually assigned the lease to TBF Financial, LLC (TBF). When Henderson defaulted on his lease payments, TBF filed a collections action against him seeking recovery of accelerated monthly charges, interest, late charges, other consequential damages, attorney fees and costs, as provided for in the terms of the agreement. TBF moved for summary judgment and submitted a copy of the agreement, including its terms and conditions contained on the reverse side, a copy of the bill of sale and assignment of the lease from Wells Fargo to TBF, and TBF's accounting records of Henderson's delinquent account.

Henderson filed a cross-motion for summary judgment, contending that TBF was not entitled to enforce the agreement against him because his lease obligations were to Copiers Northwest, not to Wells Fargo or TBF. He further contended that the contract terms on the reverse side of the agreement were illegible and therefore unenforceable. The trial court apparently denied both motions for summary judgment, although there is no order to that effect in the record.[1]

TBF filed another motion for summary judgment and submitted copies of an

[1] According to the declaration of TBF's counsel, the trial court denied the motions, ruling that TBF "appeared to be entitled to relief, and could reapply for summary judgment after it enlarged a copy of the lease contract, and after it demonstrated, to the Court's satisfaction, that Wells Fargo was the lessor under the lease."

invoice and bill of sale showing that Wells Fargo purchased the leased copier from Copiers Northwest, along with a digitally enlarged version of the contract terms and conditions that were printed on the reverse side of the agreement.[2] The trial court granted TBF's motion and entered judgment against Henderson in the amount of $22,031.66, which included $13,937.20 in unpaid principal balance, $2,977.63 in interest, $429.03 in costs, and $4,688.00 in attorney fees. Henderson appeals.

ANALYSIS

Henderson contends that the trial court erred by granting summary judgment for TBF because it improperly shifted the burden of proof to him as the nonmoving party by concluding that "Mr. Henderson's positions are just argumentative assertions that don't amount to an actual -- to actual evidence in defense of the contract." We review summary judgment orders de novo and will affirm a summary judgment if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[3] The facts and all reasonable inferences from those facts are construed in the light most favorable to the nonmoving party.[4] A party opposing summary judgment must "set forth specific facts showing there is a genuine issue for trial or have the summary judgment, if appropriate, entered against them."[5]

Henderson first argues that TBF failed to establish that it was the real party in

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[2] The copies of the digitally enlarged contract terms in the record are unfortunately no more legible than the first copy TBF submitted with the smaller wording. But as discussed below, it appears that the terms themselves are not in dispute; Henderson does not argue that those terms did not apply, just that he was unaware of them.

[3] Sheikh v. Choe, 156 Wn.2d 441, 447, 128 P.3d 574 (2006); CR 56(c); Huff v. Budbill, 141 Wn.2d 1, 7, 1 P.3d 1138 (2000).

[4] Hertog ex rel. S.A.H. v. City of Seattle, 138 Wn.2d 265, 275, 979 P.2d 400 (1999).

[5] Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 12-13, 721 P.2d 1 (1986).

interest entitled to enforce the agreement against him. He asserts that the agreement only obligated him to Copiers Northwest and that TBF failed to submit any admissible evidence that Copiers Northwest transferred the lease to Wells Fargo before it was assigned to TBF. Specifically, he challenges an affidavit submitted by TBF's manager that, in addition to providing the basis for the accounting records, stated that the lease was a finance lease between Henderson and Wells Fargo, that Wells Fargo purchased the copier for Henderson's benefit, that Henderson promised to make lease payments to Wells Fargo, and that the lease does not give Copiers Northwest any rights against Henderson. He asserts that TBF's manager lacked personal knowledge of these facts and his affidavit was therefore not competent evidence in support of TBF's motion.

But even without the affidavit, we need look no further than the agreement itself to establish these facts. Contrary to Henderson's contentions, Copiers Northwest was not the party to whom he was obligated under the plain language of the agreement. The agreement states that one who signs as personal guarantor agrees to "unconditionally and irrevocably guarantee to *Owner, its successors and assigns*, the prompt payment and performance of all obligations under the Agreement."[6] The agreement also states:

> The words "you" and "your" mean the Customer named above. The words "we," "us," and "our" refer to the Owner named below. The abbreviation "CNW" refers to Copiers Northwest, Inc.

The only two names below were Wells Fargo and Henderson: Wells Fargo signed under "ACCEPTED BY" and Henderson signed under "CUSTOMER." Thus, Wells Fargo is the "Owner named below" to whom Henderson was obligated, not Copiers

[6] (Emphasis added.)

Northwest. In fact, there is no signature at all by Copiers Northwest on the agreement. Rather, Copiers Northwest is simply listed as "Supplier" at the top of the agreement.

Other language in the agreement also indicates that Wells Fargo, as the owner and referred to as "us" and "we," is the party to the agreement, not Copiers Northwest:

> THIS AGREEMENT IS NOT BINDING UPON *US* OR EFFECTIVE UNTIL AND UNLESS *WE* EXECUTE THIS AGREEMENT. THIS AGREEMENT WILL BE GOVERNED BY THE LAWS OF THE STATE WHERE *OWNER* HAS ACCEPTED AND EXECUTED THIS AGREEMENT.[7]

Additionally, the invoice and bill of sale showing that Wells Fargo had purchased the copier from Copiers Northwest at the time it signed the agreement was further evidence that Wells Fargo was the owner and lessor of the copier.[8]

Thus, as stated in the agreement, Henderson was personally obligated to Wells Fargo as the owner and to TBF once the agreement was assigned—not Copiers Northwest. Henderson did not refute this fact with conflicting evidence. Rather, as the trial court found, he simply contested it with bare assertions that he was unaware of this fact. This observation by the trial court did not improperly shift the burden of proof as he claims; it was simply a recognition that the evidence submitted by TBF on this issue was undisputed.

Henderson further argues that the fact that Wells Fargo did not sign the agreement until six weeks after he signed it shows that he did not know that Wells Fargo was a party to the agreement but believed that he was only obligated to Copiers

[7] (Emphasis added.)

[8] The invoice is dated "5-26-06." The copy of the "BILL OF SALE" in the record is not very clear; the only legible parts are handwritten references to "Alternative Dental Solutions" with a date of "4-20-06," (the date Henderson signed the agreement) and a signature of a "Leasing Specialist" for Copiers Northwest dated 6-6-06.

Northwest. But as noted above, the agreement states that the customer is obligated to the owner and its assigns, specifies that Copiers Northwest is an entity distinct from the owner, and was never signed by Copiers Northwest. It also clearly states that only the written terms control, not any oral promises or other subjective beliefs of the parties. Moreover, the agreement did not even become effective until Wells Fargo signed. As the agreement clearly states: "THIS AGREEMENT IS NOT BINDING UPON *US* OR EFFECTIVE UNTIL AND UNLESS *WE* EXECUTE THIS AGREEMENT."[9]

Henderson next contends that the trial court erred by permitting TBF to submit digitally enhanced portions of the agreement and to enforce those portions against him because illegible contract terms are not enforceable. But he does not argue that the terms were illegible at the time he signed the contract. Rather, he contends that he was unaware of their existence and therefore did not assent to them. Indeed his declaration simply states: "I remember the first page of the lease, but I do not remember there being a second page."

The law is well settled that absent fraud or misrepresentation, a party who voluntarily and knowingly signs a written a contract is bound by its terms.[10] "[I]gnorance of the contents of a contracted expressed in a written instrument does not ordinarily affect the liability of one who signs it . . . ."[11] A party who has the opportunity to read a plain and unambiguous instrument cannot claim to have either been misled by or ignorant of its terms.[12]

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[9] (Emphasis added.)
[10] National Bank of Wash. v. Equity Investors, 81 Wn.2d 886, 912-13, 506 P.2d 20 (1973).
[11] Tjart v. Smith Barney, Inc., 107 Wn. App. 885, 897, 28 P.3d 823 (2001).
[12] Equity Investors, 81 Wn.2d at 913.

While Henderson contends that he "could not have assented to terms of which he was not and could not have been aware," TBF established his assent to the contract terms by the signed agreement itself, even without the digital enhancement of the terms of the back. The front page of the agreement clearly states in large print:

> IMPORTANT: READ BEFORE SIGNING. THE TERMS OF THIS AGREEMENT (INCLUDING THOSE ON THE REVERSE SIDE) SHOULD BE READ CAREFULLY BECAUSE ONLY THOSE TERMS IN WRITING ARE ENFORCEABLE. TERMS OF ORAL PROMISES WHICH ARE NOT CONTAINED IN THIS WRITTEN AGREEMENT MAY NOT BE LEGALLY ENFORCED.

Thus, Henderson was in fact advised of the existence of the terms contained on the reverse side of the agreement. He does not contend or otherwise demonstrate that he did not have the opportunity to read it.[13] The agreement also advised him to ask questions if he did not understand something.[14] Thus, if he did not understand the terms or could not read them because they were illegible at the time, he had the opportunity to ask for clarification before signing. That he chose not to do so does not now release him from those terms. Accordingly, absent a showing of fraud or misrepresentation, Henderson was bound to the contract he signed, including those terms contained on the reverse side of the agreement.

Henderson cites two opinions from other jurisdictions holding that an unreadable contract is unenforceable and that legibility of contract language is an issue of fact precluding summary judgment.[15] But his reliance on these cases is misplaced because

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[13] Rather, he simply asserts that "Copiers Northwest did not offer to read or explain any of the terms of the lease to me before I signed it."

[14] It states, "We have written this Agreement in plain language because we want you to understand its terms. Please read your copy of this agreement carefully and feel free to ask us any questions you may have."

[15] See McCarthy Well Co., Inc., v. St. Peter Creamery, Inc., 410 N.W.2d 312 (Minn.

unlike here, those cases involved claims that portions of a contract were illegible at the time they were signed.[16] As discussed above, Henderson does not claim that he was unable to read the terms at the time he signed the agreement nor does the record support such a claim; he simply claims that he was unaware of their existence. Absent a claim that the contract was illegible at the time it was signed or that the terms did not otherwise apply, Henderson fails to show that the trial court's use of a digitally enhanced version of the terms to enforce the agreement amounts to error.

Henderson further contends that the trial court erred by enforcing the agreement against him because it was both procedurally and substantively unconscionable. The existence of an unconscionable bargain is a question of law.[17] Procedural unconscionability is "the lack of meaningful choice, considering all the circumstances surrounding the transaction including '"[t]he manner in which the contract was entered," whether each party had "a reasonable opportunity to understand the terms of the contract," and whether "the important terms [were] hidden in a maze of fine print."'"[18] Our courts have cautioned that "'these three factors [should] not be applied mechanically without regard to whether in truth a meaningful choice existed.'"[19]

1987); American Building Supply Corp. v. Frazier Builders Corp., 2002 WL 31507029 (N.Y. City Civ. Ct. 2002) (unpublished).

[16] In McCarthy Well Co., Inc., 410 N.W.2d at 315-16, the party claimed that he could not read the terms because they were in tiny dark print on dark paper. In American Bldg. Supply Corp., 2002 WL 31507029, at *2-*3, the party claimed that the disputed portion was too small for him to read at the time he signed it.

[17] Nelson v. McGoldrick, 127 Wn.2d 124, 131, 896 P.2d 1258 (1995).

[18] Zuver v. Airtouch Commc'ns, Inc., 153 Wn.2d 293, 303, 103 P.3d 753 (2004) (quoting Nelson, 127 Wn.2d at 131 (quoting Schroeder v. Fageol Motors, Inc., 86 Wn.2d 256, 260, 544 P.2d 20 (1975))).

[19] Zuver, 153 Wn.2d at 303 (quoting Nelson, 127 Wn.2d at 131 (quoting Schroeder, 86 Wn.2d at 260)).

"Substantive unconscionability involves those cases where a clause or term in the contract is alleged to be one-sided or overly harsh."[20]

Henderson fails to show that the agreement was procedurally unconscionable. As discussed above, the agreement stated that he was bound by all written terms including those on the reverse side and advised him to ask questions if there was something he did not understand. Thus, he had a meaningful choice and opportunity to understand the terms of the contract. Additionally, the terms were not ""hidden in a maze of fine print,"" but were listed on a separate page under the heading labeled "TERMS AND CONDITIONS" in numbered paragraphs.[21]

Nor has Henderson demonstrated substantive unconscionability. "'Shocking to the conscience,' 'monstrously harsh,' and 'exceedingly calloused'" are terms our courts have used to define substantive unconscionability.[22] Henderson contends that the agreement is "one-sided or overly harsh" because the "unreadable and digitally-enhanced terms purport to exculpate Copiers Northwest from any responsibility and to unconditionally bind ADS and Henderson to payment for the full 48 months of the lease plus late fees, interest, sales tax, fees, costs, and other penalties." But he fails to show that these types of leases, guaranties, and penalties rise to the level of substantive unconscionability as in cases where contract terms were conditioned on one's employment, required parties to waive statutory rights, and the parties were otherwise in unequal positions of bargaining power.[23] Rather, this was simply an agreement by a

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[20] Schroeder, 86 Wn.2d at 260.
[21] Zuver, 153 Wn.2d at 303 (quoting Nelson, 127 Wn.2d at 131 (quoting Schroeder, 86 Wn.2d at 260)).
[22] Zuver, 153 Wn.2d at 303 (quoting Nelson, 127 Wn.2d at 131).
[23] See Adler v. Fred Lind Manor, 153 Wn.2d 331, 358, 355, 103 P.3d 773 (2004)

customer to lease office equipment that included the typical penalties and fees upon default.

Finally, Henderson contends in the alternative, that if the trial court properly ruled that he is bound by the contract terms, the court should have also bound TBF to those same terms. Specifically, he asserts that under the contract terms, he was entitled to a six percent discount for the maintenance and supplies that were not provided by Copiers Northwest and the trial court erred by not applying the discount.

A review of the record indicates that Henderson raised the issue in his response to the first summary judgment motion, but did not substantiate it with any supporting documentation showing the payments to which this discount applied. Rather, he simply asserted in the briefing:

> [P]laintiff has not supported its motion with any evidence of actual damages, so this is an issue of fact for trial. For instance, the cost savings to Copiers Northwest from not having to provide service and maintenance of the copier must be deducted from its claimed damages, but no such credit is included in plaintiff's calculations.

He did not, however, raise this issue again in his response to the second summary judgment motion or otherwise provide any supporting documentation for the claimed discount. Rather, he asserted at the end of oral argument that he was entitled to a discount, to which the court responded: "If you were serious about those, [counsel], you would have raised them in your materials rather than bringing them up as a last-minute thing at oral argument." But he did not file a motion to reconsider or other

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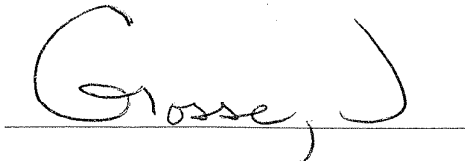
(holding unconscionable an arbitration agreement's limitation period for filing employment discrimination claims that unfairly favored employer and attorney fees provision that required employee to waive his rights to recover statutory fees and unfairly favored employer who had strong bargaining position and more resources).

supplemental materials after the court declined to consider the issue as not properly raised. He likewise fails to substantiate this claim on appeal and does not cite to any supporting documentation in the record showing the payments to which this discount applied. The trial court did not err by declining to apply the discount.

We affirm. We also deny Henderson's request for attorney fees as he is not the prevailing party.



WE CONCUR: