[Cite as *Shearer v. VCA Antech, Inc.*, 2011-Ohio-5171.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Tami Shearer, DVM,	:	
Plaintiff-Appellant,	:	
		No. 11AP-44
v.	:	(C.P.C. No. 10CVH04-5930)
VCA Antech, Inc. et al.,	:	(ACCELERATED CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on October 6, 2011

Adams, Babner & Gitlitz, LLC, and *Bryan B. Johnson*; *Gamble Hartshorn, LLC*, and *Kenneth A. Gamble*, for appellant.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., *Robert C. Petrulis*, *John Gerak*, and *Michelle R. Arendt*, for appellees.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Plaintiff-appellant, Tami Shearer, DVM, appeals a judgment of the Franklin County Court of Common Pleas that stayed litigation pending arbitration with defendants-appellees, VCA Antech, Inc., VCA Saw Mill Animal Hospital, LP, Marietta Animal Hospital, Inc., VCA Animal Hospitals, Inc., and VCA, Inc. (collectively "VCA").[1] For the following reasons, we affirm the judgment of the trial court.

[1] Originally, the American Arbitration Association was also a defendant to this action. The trial court, however, found the American Arbitration Association immune from suit and dismissed it as a party, and Shearer does not appeal that ruling.

{¶2} In the summer of 2006, Shearer began exploring the possibility of selling her veterinary practice, which she operated as a sole proprietorship, to VCA. During negotiations, VCA forwarded to Shearer drafts of three agreements that it wanted Shearer to execute to finalize the deal. In the first, entitled "Asset Purchase Agreement," Shearer agreed to sell and VCA agreed to purchase the assets of Shearer's veterinary practice for $480,000. The Asset Purchase Agreement also required the parties to arbitrate any dispute or claim arising under the agreement.

{¶3} In the second agreement, entitled "Non-competition Agreement," Shearer agreed to forgo any involvement with a veterinary practice within a 15-mile radius of the VCA Sawmill Animal Hospital for five years. Additionally, Shearer agreed that she would neither solicit or divert customers of the VCA Sawmill Animal Hospital nor use or disclose VCA's confidential information. The Non-competition Agreement also mandated that the parties arbitrate any dispute or claim arising under the agreement pursuant to the arbitration provision contained within the Asset Purchase Agreement.

{¶4} Finally, in the third agreement, entitled "Employment Agreement," Shearer agreed to work at the VCA Sawmill Animal Hospital for four years. According to the Employment Agreement, termination of the agreement could only occur at the end of the four years or any renewal term, upon Shearer's death or disability, or 30 days after written notice from VCA of termination of Shearer's employment for cause. The Employment Agreement included an arbitration provision identical to the arbitration provision within the Asset Purchase Agreement.

{¶5} Shearer took the three draft agreements to her attorney, who suggested certain modifications. Shearer made handwritten edits on the drafts and returned the edited drafts to VCA. One of Shearer's changes was the addition of language to the

Asset Purchase Agreement and the Employment Agreement to clarify that arbitration would occur in accordance with the rules of the American Arbitration Association. VCA agreed to that change.

{¶6} Shearer also added a provision to the Employment Agreement that would allow her to terminate that agreement upon written notice to VCA. VCA rejected that modification. In response, Shearer expressed concern that the Employment Agreement was overly constraining and asked VCA to explain its rejection. In an e-mail, Michael W. Everett, a vice president in VCA's legal department, replied with the following statement:

> * * * [I]n the grand scheme of things we cannot force you to work for us if you don't want to. In addition, we also have a business interest in not bullying people to work for us: we want to maintain our reputation in the veterinarian field and provide for smooth operations at our practices. No matter what the employment agreement says, you can quit whenever you want [because] there is no such thing as indentured servitude, so the question is: what are the penalties for doing so? I suppose we could come after you to try to get purchase price money back from you, but in the course of acquiring 400 animal hospitals we have never pursued this course of action. * * * We have learned the lesson that if we give a seller a 30 day out for no reason, they might just use it the day after closing, leaving us paying hundreds of thousands of dollars for a list of clients who won't visit us [because] their vet isn't there anymore. If something like that happens, then we very well might pursue the potential penalties. Therefore, we feel it is necessary to protect ourselves from this risk by not providing such an easy out from the employment agreement, and this is the reason we don't provide for a termination right such as the one [you] requested in any of our seller employee contracts.

{¶7} After receiving this reply, Shearer abandoned her request to modify the termination provision of the Employment Agreement. On October 19, 2006, Shearer and VCA executed the Asset Purchase Agreement. On February 7, 2007, Shearer and VCA executed the Non-competition Agreement and the Employment Agreement.

{¶8} Shearer worked at the VCA Sawmill Animal Hospital for a little over one year before submitting her resignation. On August 10, 2009, VCA filed a demand for arbitration with the American Arbitration Association. In the demand, VCA asserted that Shearer breached the Employment Agreement with her early departure from the VCA Sawmill Animal Hospital. Additionally, VCA alleged that Shearer misappropriated VCA confidential information and encouraged customers of the VCA Sawmill Animal Hospital to go elsewhere for their veterinary needs. Based on these allegations, VCA asserted that Shearer breached the Non-competition Agreement.

{¶9} Shearer answered VCA's demand and asserted a counterclaim. In her counterclaim, Shearer alleged that she suffered from a stress-related disability, which she claimed that VCA refused to accommodate. Shearer asserted claims for disability discrimination in violation of R.C. Chapter 4112, retaliation, breach of contract, breach of good faith and fair dealing, promissory estoppel, and fraud.

{¶10} VCA and Shearer then engaged in a protracted dispute over the selection of arbitrators. Finally, on February 19, 2010, counsel for VCA and Shearer met with the panel of three arbitrators for a management conference. The order that resulted from that conference imposed deadlines for amendments to pleadings, discovery, dispositive motions, and submittal of stipulations. The order also set October 25, 2010 as the date on which a hearing on the merits would commence.

{¶11} In a letter dated March 11, 2010, the American Arbitration Association informed the parties that they each owed a deposit of $23,842.50 on July 13, 2010, and a second deposit of $23,842.50 on September 25, 2010. The letter warned the parties that if they did not timely remit full payment, the arbitration panel could suspend the proceedings until the parties paid.

{¶12} On April 19, 2010, Shearer filed suit against VCA in the trial court. In a verified complaint, Shearer alleged that the excessive costs of the arbitration rendered the arbitration provisions of the parties' agreements procedurally and substantively unconscionable. Shearer requested that the trial court declare the arbitration provisions unenforceable and order that the parties' dispute would be determined before it, instead of an arbitration panel. Shearer also asserted claims against VCA for disability discrimination in violation of the Americans with Disabilities Act and R.C. Chapter 4112, retaliation, breach of contract, breach of good faith and fair dealing, promissory estoppel, and fraud.

{¶13} Rather than answering Shearer's complaint, VCA moved to stay the proceedings pending arbitration. In her response, Shearer requested that the trial court "set her complaint and [VCA's] application to stay for hearing before a jury as required by Ohio Rev.C. §§2711.02 and 2711.03." (Plaintiff's response to defendants' application to stay proceedings pending arbitration, at 10.)

{¶14} Without holding a hearing, the trial court granted VCA's motion. In its January 5, 2011 judgment, the trial court found that the arbitration provisions at issue were neither procedurally nor substantively unconscionable. Thus, the trial court enforced them against Shearer.

{¶15} Shearer now appeals from the January 5, 2011 judgment, and assigns the following errors:

> I. THE TRIAL COURT ERRED BY DENYING APPELLANT'S REQUEST FOR AN EVIDENTIARY HEARING[.]
>
> II. THE TRIAL COURT ERRED BY REFUSING TO FIND THE ARBITRATION PROVISION TO BE SEVERABLE AND STRICKEN FROM THE AGREEMENTS[.]

> III. THE TRIAL COURT ERRED BY FINDING THE ARBITRATION PROVISON WAS ENFORCEABLE BECAUSE IT IS NOT PROCEDURALLY AND SUBSTANTIVELY UNCONSCIONABLE[.]

{¶16} By her first assignment of error, Shearer argues that the trial court erred in denying her request for an evidentiary hearing. We disagree.

{¶17} The Ohio Arbitration Act, contained within R.C. Chapter 2711, provides two different mechanisms by which a party may enforce an arbitration provision. First, a party may apply to the trial court to "stay the trial of [an] action [pending before the court] until arbitration of the issue has been had in accordance with the agreement." R.C. 2711.02(B). Second, a party may take a more direct tack and petition a trial court "for an order directing that the arbitration proceed in the manner provided for in the written agreement." R.C. 2711.03(A).

{¶18} R.C. 2711.03 obligates a trial court to conduct a hearing, but R.C. 2711.02 does not. Thus, if a party moves for a stay under R.C. 2711.02 without also petitioning for an order compelling arbitration under R.C. 2711.03, the trial court need not hold a hearing prior to deciding the motion. *Maestle v. Best Buy Co.*, 100 Ohio St.3d 330, 2003-Ohio-6465, ¶18. See also *John R. Davis Trust 8/12/05 v. Beggs*, 10th Dist. No. 08AP-432, 2008-Ohio-6311, ¶10; *Pyle v. Wells Fargo Financial*, 10th Dist. No. 05AP-644, 2005-Ohio-6478, ¶21; *Cheney v. Sears, Roebuck and Co.*, 10th Dist. No. 04AP-1354, 2005-Ohio-3283, ¶19. "While it is within a trial court's discretion to hold a hearing when considering whether a R.C. 2711.02 stay is warranted, that statute does not on its face require a hearing, and it is not appropriate to read an implicit requirement into the statute." *Maestle* at ¶19.

{¶19} Here, VCA only moved to stay the proceedings. An evidentiary hearing, therefore, was unnecessary. In arguing otherwise, Shearer relies on R.C. 2711.03. VCA,

however, did not seek an order compelling arbitration, so R.C. 2711.03 is inapplicable. See *John R. Davis Trust 8/12/05* at ¶8 (holding that R.C. 2711.03 did not apply when the party seeking to enforce the arbitration provision did not file a motion to compel arbitration); *Cheney* at ¶18 (same). As R.C. 2711.02 does not include a hearing requirement, we conclude that the trial court did not err in failing to conduct an evidentiary hearing on VCA's motion, and we overrule Shearer's first assignment of error.

{¶20} We next address Shearer's third assignment of error, by which she argues that the trial court erred in finding that the arbitration provisions were not substantively and procedurally unconscionable. We disagree.

{¶21} Both 9 U.S.C. 2 and R.C. 2711.01(A) state that a written arbitration provision "shall be valid, irrevocable, and enforceable," except on grounds that "exist at law or in equity for the revocation of any contract." These statutes evince a strong public policy favoring arbitration. *AT&T Mobility LLC v. Concepcion* (2011), ___ U.S. ___, 131 S.Ct. 1740, 1745; *Hayes v. Oakridge Home*, 122 Ohio St.3d 63, 2009-Ohio-2054, ¶15. In light of that policy, courts must resolve any doubts regarding the scope of arbitrable issues in favor of arbitration. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (1985), 473 U.S. 614, 626, 105 S.Ct. 3346, 3353-54; *Hayes* at ¶15.

{¶22} Arbitration provisions, however, are not invincible. The final phrase of both 9 U.S.C. 2 and R.C. 2711.01(A) permits courts to invalidate arbitration provisions upon the demonstration of a generally applicable state-law contract defense, such as fraud, duress, or unconscionability. *AT&T Mobility LLC* at 1746; *Hayes* at ¶19. Here, Shearer attacks the arbitration provisions as unconscionable.

{¶23} The defense of unconscionability applies when the weaker of the contracting parties proves that it lacked the freedom of choice, understanding, and ability

to negotiate the contract together with contract terms that unreasonably favor the stronger party. *Lake Ridge Academy v. Carney* (1993), 66 Ohio St.3d 376, 383. Thus, unconscionability embodies two separate concepts: (1) procedural unconscionability, i.e., individualized circumstances that prevent a voluntary meeting of the minds from occurring, and (2) substantive unconscionability, i.e., unfair and unreasonable contract terms. *Jones v. Centex Homes*, 189 Ohio App.3d 668, 2010-Ohio-4268, ¶27; *Khoury v. Denney Motors Assoc., Inc.*, 10th Dist. No. 06AP-1024, 2007-Ohio-5791, ¶11. The party asserting the unconscionability defense bears the burden of proving that the arbitration provision is both procedurally and substantively unconscionable. *Hayes* at ¶20; *Taylor Bldg. Corp. v. Benfield*, 117 Ohio St.3d 352, 2008-Ohio-938, ¶34. As a determination of whether an arbitration provision is unconscionable is an issue of law, appellate courts employ a de novo standard when reviewing such a determination. *Hayes* at ¶21; *Taylor Bldg. Corp.* at ¶35.

{¶24} In determining whether an arbitration provision is procedurally unconscionable, courts consider the circumstances surrounding the contracting parties' bargaining, such as the parties' age, education, intelligence, and business acumen and experience. *Hayes* at ¶23; *Taylor Bldg. Corp.* at ¶44. Additional considerations include who drafted the contract, whether alterations to the contract were possible, whether the terms were explained to the weaker party, and whether the party challenging the provision was represented by counsel. Id.; *Corl v. Thomas & King*, 10th Dist. No. 05AP-1128, 2006-Ohio-2956, ¶31. The crucial question is whether each party to the contract had a reasonable opportunity to understand the terms of the contract. *Lake Ridge Academy* at 383.

{¶25} In the case at bar, VCA may have had more bargaining power, but Shearer was not without her own resources. Shearer owned and operated her own veterinary business, thus she had business experience. Additionally, Shearer was able to review drafts of all three agreements with her attorney. Based on her attorney's suggestions, Shearer made revisions to the contract language, including the arbitration provisions, which appeared in the executed agreements.[2] Given these facts, we cannot conclude that Shearer was overborne by VCA's superior bargaining power and deprived of meaningful choice when entering the agreements. The arbitration provisions, therefore, are not procedurally unconscionable.

{¶26} In arguing against this conclusion, Shearer alleges that Everett, a VCA vice president, misled her into believing that the arbitration provisions were "of little or no importance, and had never been, and would never be, invoked." (Appellant's brief, at 10.) To support this allegation, Shearer relies on Everett's e-mail, in which he stated that if Shearer quit, "[he] suppose[d] [VCA] could come after [Shearer] to try to get purchase price money back from [her], but in the course of acquiring 400 animal hospitals [VCA] ha[d] never pursued this course of action." We do not agree with Shearer that this statement indicates that VCA would never invoke the arbitration provisions against Shearer. To the contrary, Everett warned Shearer that VCA could "come after" her if she quit, presumably a reference to arbitration.

{¶27} Although Everett did not foreswear arbitration, he did downplay the possibility that VCA would pursue arbitration against Shearer by representing that VCA

[2] We recognize that Shearer swore in her verified complaint that the arbitration provisions of the three agreements were not subject to negotiation. The trial court did not believe this conclusory statement given the contradictory evidence that VCA submitted, which included copies of the draft agreements with Shearer's handwritten changes to the arbitration provisions. We must accord the trial court's credibility determination great deference. *Taylor Bldg. Corp.* at ¶38. Consequently, like the trial court, we reject Shearer's conclusory statement.

had not invoked arbitration "in the course of acquiring 400 animal hospitals." If untrue, this representation might have evidenced procedural unconscionability. *Deutsche Bank Natl. Trust Co. v. Pevarski*, 187 Ohio App.3d 455, 2010-Ohio-785, ¶31 (holding that unconscionability results if one party misleads the other as to the "basis of the bargain"). Shearer, however, failed to present any evidence that the representation was false. See *Taylor Bldg. Corp.* at ¶47 (finding no procedural unconscionability when the party seeking to invalidate the arbitration provision failed to prove false the other party's statement that it "never had any disputes over the quality of its product and workmanship"). Consequently, we conclude that Everett's representation, without more, does not render the arbitration provisions procedurally unconscionable.

{¶28} Shearer also alleges that Everett knew about the excessive costs that Shearer would face to arbitrate a dispute with VCA, but Everett withheld information about the costs from Shearer. The record contains no evidence to substantiate this allegation. As the party challenging the enforceability of the arbitration provisions, Shearer had to come forward with evidence supporting her challenge. *Hayes* at ¶27. Mere unsupported allegations that one party misled another do not warrant a finding of procedural unconscionability.

{¶29} Having found that the arbitration provisions are not procedurally unconscionable, we need not address whether they are substantively unconscionable. As we stated above, a party asserting the defense of unconscionability must demonstrate both procedural and substantive unconscionability. *Hayes* at ¶20; *Taylor Bldg. Corp.* at ¶34. The failure to demonstrate either type of unconscionability alleviates the need to address the other. *John R. Davis Trust 8/12/05* at ¶21; *Reno v. Bethel Village*

Condominium Assn., Inc., 10th Dist. No. 08AP-10, 2008-Ohio-4462, ¶13; *Corl* at ¶37. Accordingly, overrule Shearer's third assignment of error.

{¶30} By her second assignment of error, Shearer argues that the trial court erred in refusing to sever the arbitration provisions from the three agreements. Because Shearer has not proven that the arbitration provisions are unenforceable, no reason exists to sever them from the agreements. Accordingly, we overrule Shearer's second assignment of error.

{¶31} For the foregoing reasons, we overrule all of Shearer's assignments of error, and we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT, P.J., and BROWN, J., concur.