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NO. 53286-7-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

ZURIXX, LLC d/b/a Rules of Renovation, a Utah limited liability
company,

Appellant,

vs.

LYNNE A. DELORIEA and STEPHEN E. DELORIEA, a married
couple,

Respondents.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

The trial court below refused to enforce the arbitration provision in a two-page purchase agreement (the “Arbitration Agreement”).¹ In defense of this erroneous ruling, Respondents Lynne A. DeLoria and Stephen E. DeLoria (the “DeLorieas”) assert that the Arbitration Agreement is unconscionable and violates public policy. Neither the record evidence nor the applicable law supports these arguments.

First, the DeLorieas argue that the Arbitration Agreement is procedurally unconscionable because it was “hidden” and they did not read it, despite having three business days to read and consider the terms of a two-page contract. The Arbitration Agreement is called out on the first page of the purchase agreement just above the signature line; it is set forth in full on the second page; and a three-business day rescission period provides sufficient time to read and consider a two-page purchase agreement. Under the applicable law, the DeLorieas had a meaningful choice.

Second, the DeLorieas argue that the Arbitration Agreement is substantively unconscionable because they seek to assert claims against a third party (Foundation Funding) under a different contract that does not

¹ “Arbitration Agreement” means the “Dispute Resolution Agreement” in CP 65 and CP 67.

have an arbitration provision—and would incur additional attorneys’ fees. This argument misconstrues Washington law regarding when an arbitral forum is cost-prohibitive. That a claimant may wish to assert claims against third parties does not vitiate a valid arbitration agreement.

Finally, the DeLorieas argue that the Arbitration Agreement violates public policy because—they speculate—the arbitration may end up taking place in some other state, the arbitrator “may or may not” apply Washington law, and thus the DeLorieas might be precluded from prosecuting a statutory claim that they have not alleged. This argument of cascading contingencies is contrary to the plain language of the Arbitration Agreement, which requires the arbitration to take place in a location reasonably convenient to the DeLorieas, who live in Washington. Moreover, under settled Washington law, a statutory claim is arbitrable. The DeLorieas forgo no substantive rights by having such a claim, if it were to be alleged, resolved in the arbitral rather than judicial forum.

The Arbitration Agreement is enforceable.

II. ARGUMENT

A. **The DeLorieas’ Assertion That their Claims Are “Uncontested” is Inapposite and Incorrect.**

This appeal solely concerns the proper forum for resolution of the DeLorieas’ asserted claims. In evaluating a motion to compel arbitration, “it is the court’s duty to determine whether the parties have agreed to

arbitrate a particular dispute.” *In re Marriage of Pascale*, 173 Wn. App. 836, 842, 295 P.3d 805 (2013) (quoting *Peninsula Sch. Dist. No. 401 v. Pub. Sch. Emps. of Peninsula*, 130 Wn.2d 401, 413, 924 P.2d 13 (1996)); *see also* RCW 7.04A.060; RCW 7.04A.070.

The DeLorieas state that their factual allegations against Zurixx are “uncontested” and they spend a significant portion of their brief discussing those allegations. Respondents’ Br. at 2-8. But seeking enforcement of the parties’ Arbitration Agreement rather than litigating the merits in court does not render substantive allegations admitted or deem them uncontested. In this context, “the court cannot decide the merits of the controversy”—“only whether the grievant has made a claim which on its face is governed by the contract.” *In re Marriage of Pascale*, 173 Wn. App. at 842 (quoting *Peninsula Sch. Dist. No. 401*, 130 Wn.2d at 413) (emphasis in original).

The purported merits of the DeLorieas’ claims have no bearing on the issue of whether those claims are subject to arbitration. What matters is that the DeLorieas do not dispute that their claims all fall within the scope of the Arbitration Agreement.

B. The DeLorieas Do Not Establish Procedural Unconscionability

To establish procedural unconscionability, the DeLorieas must show they lacked meaningful choice regarding the Arbitration Agreement.

Zuver v. Airtouch Comm'ns, Inc., 153 Wn.2d 293, 304, 103 P.3d 753

(2004)). They make no such showing.

1. The DeLorieas Had a Reasonable Opportunity to Read and Consider the Arbitration Agreement.

As discussed in Zurixx's Brief, procedural unconscionability turns on whether the DeLorieas "lacked meaningful choice" regarding the Arbitration Agreement. Appellant's Br. at 19-22. Here, it is undisputed that the DeLorieas had three business days after signing the purchase contract to review the two-page document—and to cancel it if they wished. CP 64-67. This cancellation or rescission right was set forth in bold just above where the DeLorieas signed, and it provided them with both a prompt and a reasonable opportunity to read and consider the Arbitration Agreement. CP 64-67; *Zuver*, 153 Wn.2d at 305-06 (citing *Luna v. Household Finance Corp. III*, 236 F.Supp.2d 1166, 1176 (W.D.Wash. 2002) (three-day rescission period in complex debt adjustment contract provided reasonable opportunity for consumer to consider terms)).

Contrary to the DeLorieas' assertion that "Zurixx did not tell them how" to cancel, the purchase contract specifically directed the DeLorieas to the second page of the agreement for more information about how to

cancel. CP 64; CP 66. The second paragraph on that second page provides both a contact phone number and the process for cancellation:

RETURN PROCESS: For cancellations and returns, please call Elite Customer Service at 800-203-1402 to obtain a Return Authorization Code and shipping address. Items must be returned in resalable condition to receive full refund.

CP 65; CP 67.

The DeLorieas argue it is “audacious” to find that three business days provided them with a reasonable opportunity to read the two-page document, ask questions, or get the advice of an attorney. Respondents’ Br. at 13. But beyond employing a colorful adjective, the DeLorieas fail to articulate any reason why three business days is an insufficient period of time to review and consider a two-page document.²

² Moreover, Washington law does not require any rescission period for an arbitration agreement to be enforceable. The relevant inquiry is whether the DeLorieas had a meaningful choice regarding the Arbitration Agreement. The existence of a three-business day cancellation period and the plain language of the two-page purchase contract and the included Arbitration Agreement show the DeLorieas had a reasonable opportunity to consider its terms. *Zuver*, 153 Wn.2d at 304-07; *Satomi Owners Ass’n v. Satomi, LLC*, 167 Wn.2d 781, 814-15, 225 P.3d 213 (2009). The DeLorieas’ citation to a statute which requires certain business opportunity contracts to include a seven-day rescission period is inapposite. Op. at 13.

2. The DeLorieas' Choice to Not Read the Two-Page Contract Does Not Render the Arbitration Agreement Unenforceable.

The DeLorieas argue the Arbitration Agreement is procedurally unconscionable because it is somehow “hidden” on the second page of a two-page purchase contract and they just never read it. This argument is both factually incorrect and legally insufficient to establish procedural unconscionability.

The Arbitration Agreement is not hidden. It is set forth in normal sized type font on the second page. CP 64-67. It is also called out on the first page. CP 64; CP 66. Just above where Ms. DeLoriea signed, it states

By signing below, I acknowledge that I have received the physical materials referenced above and that I have read and agree to the terms and conditions described in the Fulfillment, Return, Non-Sufficient Funds, Guarantees and Representations, Funding, and **Dispute Resolution on the reverse side of this Purchase Order.**

CP 64; CP 66 (emphasis supplied).

The DeLorieas cite no authority under which a party’s failure to read a contract provision renders it unenforceable. They do not, because this argument directly contradicts settled Washington law. *See* Appellant’s Br. at 22, n. 10 (discussing Washington law under which the failure to read a contract does not excuse one’s obligations and examples of Washington courts rejecting this argument as a defense to the

enforcement of an arbitration agreement). One cannot avoid contract terms on the excuse that one failed to “flip over the document” being signed. Respondents’ Br. at 10.

3. The DeLorieas’ Arguments About the Purchase Contract As a Whole are for the Arbitrator To Adjudicate.

Finally, the DeLorieas make arguments about the purchase agreements as a whole in an attempt to show that the Arbitration Agreement is procedurally unconscionable.³ More specifically, the DeLorieas assert that they purchased the real estate education packages because of “high pressure sales tactics” and because they felt they “would be missing out on an amazing opportunity to make money” if they didn’t sign up. Respondents’ Br. at 2-5, 11-12.

But whether the purchase agreements as a whole are procedurally unconscionable and thus unenforceable is a matter for the arbitrator to decide—not the court. RCW 7.04A.060(3); *Townsend v. Quadrant Corp.*, 173 Wn.2d 451, 458-60, 268 P.3d 917 (2012). For the Arbitration Agreement to be found procedurally unconscionable, the DeLorieas must offer facts regarding that specific provision. *Id.* Other than stating that

³ As discussed in Appellant’s Brief, the DeLorieas signed two separate two-page contracts for the purchase of certain real estate education packages, and each of those contracts contains an identical Arbitration Agreement. CP 64-67; Appellant’s Br. at pp. 5-7.

they did not read it or have a chance to negotiate it, they offer no such facts. This is insufficient to establish procedural unconscionability. *See* Section II(B)(2), *supra*; *Zuver*, 153 Wn.2d at 304-07 (inequality of bargaining power or establishing arbitration agreement is a contract of adhesion does not establish procedural unconscionability).

For example, in *Townsend v. Quadrant Corp.*, 153 Wn. App. 870, 224 P.3d 818 (2009), *aff'd Townsend*, 173 Wn.2d at 458-60, a real estate purchase agreement contained an arbitration provision. Plaintiffs argued that defendants had used “high-pressure tactics” to “force the Homeowners to sign the [purchase] agreement immediately” and that they did not have a chance to review or question the provisions of those contracts. 153 Wn. App. at 885. The Court of Appeals held that these arguments concerned the agreements as a whole rather than the arbitration provision specifically and were insufficient to establish procedural unconscionability of the arbitration provision. *Id.* The Court of Appeals held the arbitration provision was enforceable, and it was for the arbitrator to determine enforceability of the contract as a whole. *Id.* The Washington Supreme Court affirmed. 173 Wn.2d at 458-60.

Similarly, the DeLorieas have not established the Arbitration Agreement is procedurally unconscionable, and their assertions regarding

the enforceability of the purchase agreements as a whole are for the arbitrator to determine. *Townsend*, 173 Wn.2d at 458-60.

C. The Arbitration Agreement is Not Substantively Unconscionable.

The DeLorieas argue that the Arbitration Agreement is also substantively unconscionable. Here too, they make no such showing.

As discussed in Zurixx’s Brief, an arbitration agreement is substantively unconscionable where the arbitral forum is inaccessible because the costs of arbitrating rather than proceeding in court are “so high relative to” (1) plaintiff’s financial condition and (2) the small size of plaintiff’s claims. Appellant’s Br. at pp. 17-19. The DeLorieas’ financial condition alone does not show that the arbitral forum is inaccessible given the low costs under the Arbitration Agreement (\$687.50 in arbitration fees the DeLorieas must pay) and the value of the DeLorieas’ asserted claims (over \$100,000). *Id.*; CP 8 at ¶ 3.42.

Further, there is no support for the DeLorieas’ assertion that the Arbitration Agreement between them and Zurixx is substantively unconscionable because enforcing the agreement would require them to incur additional attorneys’ fees litigating separate claims against a third party in court. The single case the DeLorieas cite—*Townsend*, 153 Wn. App. at 883—does not so hold.

In *Townsend*, the plaintiffs argued that enforcing the arbitration agreement would require them to litigate some of their claims in arbitration and other of their claims (tort claims) against the same defendants in court. 153 Wn. App. at 883. *Townsend* did not concern whether attorneys' fees incurred to pursue claims against a third-party can be used to invalidate an arbitration agreement. *Id.*

Regardless, the Court of Appeals in *Townsend* rejected the plaintiffs' argument. There, as here, plaintiffs "did not present evidence of the cost of arbitration as compared to the value of their claim, necessary to satisfy the burden" to show plaintiffs would be effectively precluded from pursuing their claims if forced to proceed in arbitration rather than court because doing so would be cost prohibitive. 153 Wn. App. at 883; *see also* Appellant's Br. at pp. 17-19.

The DeLorieas also speculate that the arbitration could take place in another state and therefore drive up costs. But this argument is contrary to the plain language of the Arbitration Agreement, which requires arbitration to take place in a "reasonably convenient location." CP 65; CP 67. An out of state arbitration would not be a reasonably convenient location.

D. The Arbitration Agreement Does Not Violate Public Policy.

Finally, the DeLorieas argue that the Arbitration Agreement violates public policy because the arbitration could possibly take place in another state, the arbitrator therefore “may or may not” apply Washington law, and thus the DeLorieas could potentially be precluded from asserting a claim against Zurixx for alleged violation of Washington’s Business Opportunity Fraud Act, Chapter 19.110 RCW, *et seq.*

As a threshold matter, the DeLorieas have not alleged this claim. Moreover, this argument is based upon the same speculation that contradicts the plain language of the Arbitration Agreement. CP 65; CP 67.

The DeLorieas can assert statutory claims in arbitration, including claims based upon consumer protection statutes, and nothing about enforcing the Arbitration Agreement would preclude them from doing so. *See Garmo v. Dean, Witter, Reynolds, Inc.*, 101 Wn.2d 585, 681 P.2d 253 (1984) (holding statutory claim under Washington’s Consumer Protection Act (“CPA”) is arbitrable under the FAA; reversing trial court denial of motion to compel arbitration of CPA claim); *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 457, 45 P.3d 594 (2002) (holding CPA claim is arbitrable under chapter 7.04 RCW); *Stein v. Geonerco, Inc.*, 105 Wn. App. 41, 50 n. 1, 17 P.3d 1266 (2001) (CPA claim is arbitrable); *see*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date I caused a copy of the foregoing document to be served on the following in the manner indicated below:

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I hereby certify, under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct.

DATED this 14th day of November, 2019, at Seattle, Washington.



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