

STATE OF MICHIGAN
COURT OF APPEALS

ELETE ENTERPRISES, L.L.C.,

Plaintiff-Appellee,

v

GENERAL STEEL CORPORATION,

Defendant-Appellant.

UNPUBLISHED

October 21, 2008

No. 278946

Macomb Circuit Court

LC No. 2007-001360-CH

Before: Schuette, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Plaintiff, a Michigan corporation, entered into a purchase agreement with defendant, a Colorado corporation, for the purchase of a prefabricated building. Plaintiff subsequently filed this action in the Macomb Circuit Court, alleging breach of the purchase agreement. Defendant moved for summary disposition under MCR 2.116(C)(4) and (7), arguing that any disputes between the parties were required to be arbitrated in Denver, Colorado, pursuant to a forum-selection and arbitration paragraph in the parties' agreement. The trial court granted defendant's motion to dismiss the case on the basis of an agreement to arbitrate, but ruled that "the case shall be arbitrated in Michigan." Defendant appeals as of right. We affirm that part of the judgment granting summary disposition in favor of defendant on the basis of an agreement to arbitrate, but reverse that part of the judgment that ordered the case to be arbitrated in Michigan.

Plaintiff's complaint alleged that it entered into a purchase agreement with defendant on September 6, 2005, pursuant to which defendant agreed to provide plaintiff with a prefabricated building and plaintiff agreed to pay defendant \$116,553 for the building. Plaintiff further alleged that it paid defendant \$30,004 as a deposit on the building as provided for in the purchase agreement and that it performed all of its obligations under the contract. Plaintiff additionally asserted that it had yet to receive the building or building materials as required by the purchase agreement and that defendant had refused to refund the deposit. Plaintiff alleged that the failure to deliver the building or refund the deposit constituted a material breach of contract, proximately resulting in damages in the amount of \$30,004.

The purchase agreement provides that it is subject to all of the conditions set forth in the agreement, including those contained on a "separate conditions page." Plaintiff's execution of the agreement, per the contractual language, ostensibly reflected plaintiff's acknowledgement and acceptance of all of the terms and conditions. Paragraph 17 on the page of conditions reads as follows:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. The party initiating arbitration shall advance all costs thereof. The place of arbitration shall be Denver, Colorado. This agreement shall be governed by and interpreted in accordance with the laws of the State of Colorado. The parties acknowledge that this agreement evidences a transaction involving interstate commerce. The United States Arbitration Act shall govern the interpretation, enforcement, and proceedings pursuant to the arbitration clause in this agreement. The arbitrator will have no authority to award punitive, consequential or other damages not measured by the prevailing party's actual damages, except as may be required by statute. Except as may be required by law, neither a party nor an arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both parties.

Defendant moved to dismiss plaintiff's action under MCR 2.116(C)(4)(lack of jurisdiction) and (7)(claim barred by agreement to arbitrate), relying in part on the Federal Arbitration Act (FAA), 9 USC 1 *et seq.* Defendant argued that dismissal was required because the parties agreed to arbitrate any disputes arising out of the purchase agreement, including breach of contract claims, and they agreed to arbitrate such matters in Denver, Colorado.¹ Defendant attached the affidavit of its order processing manager in support of the motion, which averred that defendant was ready, able, and willing to deliver the building and building materials in accordance with the purchase agreement; however, plaintiff refused acceptance.

In response, plaintiff argued that the contract terms were not binding because they were unconscionable and executed under duress without assistance of counsel, that defendant was never ready, willing, and able to deliver the building, that MCL 600.745(3)(c), (d), and (e) allow plaintiff to avoid the forum-selection clause, and that the arbitration clause was invalid because it was unconscionable. The claims of unconscionability were predicated on alleged fraudulent sales tactics. Plaintiff submitted the affidavit of its sole member, Lea Hebert, who averred that she was told that she could receive a "special" or "clearance" price on a building that was returned, but she had to sign the purchase agreement and submit a deposit that day to receive this special deal as time was of the essence. Therefore, Hebert averred, she did not have an opportunity to review the agreement with her attorney before signing it. Plaintiff also submitted evidence that a Colorado court, with respect to litigation initiated by the Colorado Attorney General's Office, had found that defendant previously engaged in similar false and deceptive sales tactics relative to other customers.

¹ Defendant did not argue below that the enforceability of the forum-selection provision was governed by Colorado law. Instead, defendant relied on Michigan and federal law to argue in favor of dismissal. Accordingly, we conclude that defendant waived any argument that the validity of the forum-selection provision is governed by Colorado law. Moreover, defendant fails to cite any Colorado law on appeal, nor does plaintiff place any reliance on Colorado law.

At the hearing on the motion for summary disposition, the trial court ruled that the case had to be arbitrated. But the court, citing its equitable authority, also ruled that arbitration proceedings must take place in Michigan because it was evident that defendant, relative to the transaction with plaintiff, had continued its past practices of engaging in improper sales tactics as reflected in the Colorado litigation. The trial court dismissed the case with prejudice, providing in the order of dismissal that “summary disposition is granted and the case shall be arbitrated in Michigan.”

On appeal, defendant, while agreeing with the trial court’s ruling dismissing the case on the basis of an agreement to arbitrate, challenges the court’s order that the arbitration take place in Michigan. Defendant argues that the FAA requires enforcement of the arbitration paragraph as written, that the FAA preempts state law, that Colorado is the proper forum for arbitration, that there was no basis for the trial court’s factual findings, and that the trial court improperly relied on bias when it ordered arbitration in Michigan.

This Court reviews de novo a trial court’s decision on a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). Questions of law, including statutory construction, are likewise reviewed de novo on appeal. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006); *Wayne Co v Hathcock*, 471 Mich 445, 455; 684 NW2d 765 (2004).

We first note that plaintiff, in its appellee brief, argues that the trial court erred by enforcing an unconscionable arbitration provision, given that defendant fraudulently induced plaintiff to sign the purchase agreement. Thus, although plaintiff agrees that the trial court ruled correctly that the forum-selection provision embedded in the arbitration paragraph is unenforceable, plaintiff seeks to invalidate the entire arbitration paragraph. However, plaintiff did not file a cross-appeal challenging the trial court’s ruling that the case be dismissed pursuant to an agreement to arbitrate. In *Turcheck v Amerifund Financial, Inc*, 272 Mich App 341, 351; 725 NW2d 684 (2006), this Court stated:

Although filing a cross-appeal is not necessary to argue an alternative basis for affirming the trial court's decision, the failure to do so generally precludes an appellee from raising an issue not appealed by the appellant. Defendant's failure to file a cross-appeal from the trial court's denial of its request for attorney fees precludes it from now attempting to obtain a decision more favorable than that rendered below. [Citations omitted.]

Plaintiff here is similarly attempting to obtain a decision more favorable than that rendered by the trial court, and the failure to file a cross-appeal defeats plaintiff’s attempt to challenge the general validity of the arbitration paragraph and the dismissal of the case on the basis of an agreement to arbitrate. Accordingly, that part of the judgment granting summary disposition in favor of defendant pursuant to an agreement to arbitrate is affirmed. The only issue properly before us is whether the trial court erred in excising or finding unenforceable the forum-selection provision embedded within the arbitration paragraph.

The purchase agreement calls for arbitration to be governed by the FAA, and this is proper considering that there is no dispute that the agreement involves interstate commerce. 9 USC 1 and 2; *Burns v Olde Discount Corp*, 212 Mich App 576, 580; 538 NW2d 686

(1995)(FAA governs actions in both federal and state courts that arise out of contracts involving interstate commerce). “State courts are bound under the Supremacy Clause, US Const, art VI, § 2, to enforce the substantive provisions of the [FAA].” *Kauffman v Chicago Corp*, 187 Mich App 284, 286; 466 NW2d 726 (1991). 9 USC 2 provides:

A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Under 9 USC 2, state law regarding generally applicable contract defenses, including fraud, duress, or unconscionability, can be applied to invalidate arbitration agreements without contravening the FAA. *Doctor’s Assoc, Inc v Casarotto*, 517 US 681, 686-687; 116 S Ct 1652; 134 L Ed 2d 902 (1996). A court cannot invalidate an arbitration agreement subject to the FAA under a state law that is applicable only to arbitration provisions. *Id.* at 687. Congress precluded the states from singling out arbitration provisions and giving them suspect status. *Id.* Instead, arbitration agreements must be placed on the same footing as any other contracts. *Id.* In *Doctor’s Assoc, id.*, the United States Supreme Court ruled that a Montana statute that conditioned the enforceability of arbitration agreements on compliance with special notice requirements not applicable to contracts in general conflicted with, and was preempted by, the FAA.

With respect to forum-selection provisions under Michigan law, MCL 600.745 provides in pertinent part:

(3) If the parties agreed in writing that an action on a controversy shall be brought only in another state and it is brought in a court of this state, the court shall dismiss or stay the action, as appropriate, unless any of the following occur:

(a) The court is required by statute to entertain the action.

(b) The plaintiff cannot secure effective relief in the other state for reasons other than delay in bringing the action.

(c) The other state would be a substantially less convenient place for the trial of the action than this state.

(d) The agreement as to the place of the action is obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means.

(e) It would for some other reason be unfair or unreasonable to enforce the agreement.

Section 745(3) is applicable to contracts in general and does not single out arbitration agreements. Plaintiff relies on § 745(3)(c), (d), and (e) in its attempt to avoid the forum-selection provision. Michigan generally enforces contractual forum-selection provisions, and the party seeking to avoid such a provision bears a heavy burden of showing that the provision should not be enforced under one of the statutory exceptions in MCL 600.745(3). *Turcheck, supra* at 348. Plaintiff has failed to meet that burden in the case at bar. The Colorado litigation commenced by the Colorado Attorney General’s Office against defendant did not pertain to the transaction between plaintiff and defendant and is thus essentially irrelevant for purposes of our analysis. Even if considered to show a common plan or scheme, it would not change the outcome of this case and our ruling for the reasons indicated below. And while Hebert’s affidavit indicates that she was purposefully rushed into executing the purchase agreement and that she was never made aware of the forum-selection and arbitration language, the contract is a mere two pages long and clearly sets forth the arbitration and forum-selection mandates on the page entitled “CONDITIONS.” In *Draeger v Kent Co Savings Ass’n*, 242 Mich 486, 489; 219 NW 637 (1928), our Supreme Court indicated that where a party is not prevented from reading a contract by use of some artifice and does not claim that he or she is unacquainted with the English language, the party cannot avoid enforceability of the clear language in the contract on the basis of fraudulent inducement, given the party’s inexcusable neglect in failing to read or take notice of the contractual language. The *Draeger* Court stated:

In the instant case, the testimony shows that the plaintiff Emil Draeger was an intelligent man. He could read and write and had some experience in the purchase of stocks. No artifice, no means fraudulent or otherwise, were used to prevent him from reading the contract, which was simple and understandable to a man of ordinary intelligence. He chose to sign it without reading. If he had read it, he would have been informed that any statement made by the agent and not contained in the writing was not binding on the association. If he had read it, he would have been informed that it was not the same as the oral contract which he had made with the agent. It was his duty to read it before signing, not alone for his own protection but as well for the defendant association. [*Id.* at 489-490.]

Here, there is not even a claim that defendant communicated to plaintiff anything contrary to or inconsistent with the arbitration paragraph. Defendant did nothing to prevent plaintiff from reading the arbitration language, which certainly could be read in short fashion. Again, this contract is a mere two pages. Even if it could be said that defendant intended to engage in a “stratagem, trick, or artifice” to induce plaintiff not to read the agreement by way of setting a very short deadline to accept the contract, the circumstances do not support a conclusion that a person in plaintiff’s position would not have had the ability to swiftly and timely glean from the contract the arbitration requirements. *Int’l Transportation Ass’n v Bylenga*, 254 Mich 236, 239; 236 NW 771 (1931). The arbitration paragraph and its accompanying terms are straightforward and understandable to a person of ordinary intelligence; input from an attorney, while helpful, is not necessary to comprehend the gist of the paragraph. The paragraph demands arbitration on all claims or controversies arising out of the contract, and we fail to see how plaintiff could not comprehend the requirement that the place of arbitration “shall be Denver, Colorado.”

We conclude that Colorado is not *substantially* less convenient than Michigan, that the forum-selection agreement was not obtained by misrepresentation, that there is no basis to invalidate the agreement on duress, unconscionability, or other equitable principles where the arbitration paragraph and forum-selection provision were quickly and easily discernible, and that the provision is not unfair or unreasonable. MCL 600.745(3)(c), (d), and (e).

Moreover, because the arbitration paragraph in general is being enforced, the FAA suggests that a forum-selection provision contained as a term within the arbitration paragraph must also be enforced. 9 USC 4 provides in part that “[t]he court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration *in accordance with the terms of the agreement.*” (Emphasis added.) Here, there is no longer an issue regarding the making of an agreement to arbitrate as it formed the basis of summary dismissal unchallenged on appeal, and the forum-selection provision is simply a term of the arbitration agreement.

Further, in *Buckeye Check Cashing, Inc v Cardegna*, 546 US 440; 126 S Ct 1204; 163 L Ed 2d 1038 (2006), the United States Supreme Court addressed the issue of whether a court or an arbitrator should determine the validity of a purportedly usurious contract containing an arbitration provision. The Court held that, “regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.” *Id.* at 449. The Court reaffirmed its holding in *Prima Paint Corp v Flood & Conklin Mfg Co*, 388 US 395; 87 S Ct 1801; 18 L Ed 2d 1270 (1967), noting that in *Prima Paint* the Court held that a claim of fraud in the inducement of the entire contract or the contract generally was a matter to be referred to an arbitrator and not to be decided by a court, but if the claim were fraud in the inducement of the “arbitration clause itself – an issue which goes to the making of the agreement to arbitrate – the federal court may proceed to adjudicate it.” *Buckeye Check Cashing, supra* at 444-445.

The problem with plaintiff’s position is that its reliance on concepts of misrepresentation, unconscionable means, duress, fraud in the inducement, and equity in general goes to a great extent to the entire contract itself given the alleged inappropriate actions by defendant, despite plaintiff’s attempt to now confine it to the forum-selection provision embedded in the arbitration paragraph. Indeed, plaintiff below spoke in terms of the contract generally being unenforceable because of fraud in the inducement. Defendant was accused of improperly rushing plaintiff and otherwise acting inappropriately relative to execution of the overall purchase agreement and not with respect solely to the arbitration paragraph. Therefore, it is even questionable whether the trial court, as opposed to an arbitrator, had authority to address the equitable arguments raised.

Finally, in *Merrill Lynch, Pierce, Fenner & Smith, Inc v Lauer*, 49 F3d 323, 327 (CA 7, 1995), the federal appellate court stated that, pursuant to 9 USC 4, where an arbitration agreement contains a forum-selection provision, only a district court within that forum can issue an order that compels arbitration. Because there is no challenge to the trial court’s determination that the arbitration agreement here is generally enforceable, and because we find no basis to conclude that the forum-selection provision is not equally enforceable, the trial court lacked authority to compel arbitration, let alone compel arbitration in Michigan.

We affirm that part of the judgment granting summary disposition in favor of defendant on the basis of an agreement to arbitrate, but reverse that part of the judgment that ordered the case to be arbitrated in Michigan.

/s/ Bill Schuette
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald