NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4112-10T3

HARD GROVE CAFÉ and
ALEXANDRA BONILLA,

Plaintiffs-Appellants,

v.

DOMESTIC LINEN SUPPLY CO., INC.,
d/b/a DOMESTIC UNIFORM RENTAL,

Defendant-Respondent,

and

RICHARD THEN, as employee of
Domestic Uniform Rental; JOHN
LACHAWIEZ, as Manager of Domestic
Uniform Rental; and MARK COLTON,

Defendants.

Argued November 7, 2011 - Decided November 21, 2011

Before Judges A. A. Rodríguez and Sabatino.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-6389-10.

Eliot Skolnick argued the cause for appellants (Law Office of Evelyn Padin, attorney; Mr. Skolnick, on the brief).

Bryan D. Press argued the cause for respondent (Bryan D. Press, attorney; Mr. Press and Lawrence G. Tosi, on the brief).

PER CURIAM

Plaintiffs, Hard Grove Café ("Hard Grove") and Alexandra Bonilla ("Bonilla"), appeal the trial court's order of January 21, 2011 dismissing their lawsuit without prejudice and referring this business dispute to commercial arbitration. Plaintiffs also appeal the trial court's order dated March 18, 2011, denying their motion for reconsideration. For the reasons that follow, we affirm those orders in part, and remand in part concerning the discrete issue of the alleged unconscionability of the arbitration clause in the parties' contract.

Hard Grove is a café in Jersey City. Bonilla is an employee of Hard Grove. Domestic Linen Supply Co., Inc. ("Domestic Linen"), doing business as Domestic Uniform Rental, is a linen and uniform supplier, and one of several defendants named in plaintiffs' complaint. The individual co-defendants were Richard Then, a district sales manager of Domestic Linen who dealt with Bonilla; John Lachawiez, another manager of Domestic Linen; and Mark Colton, a Michigan attorney for Domestic Linen.[1]

[1] Although it is not explicitly stated in the trial court's orders, it appears from the trial court's comments on the record (continued)

The parties' dispute arises from an agreement dated May 12, 2010. On that day, Then went to Hard Grove and solicited the café's uniform rental business during a conversation with Bonilla. As a result of that meeting, Bonilla and Then both signed a three-page form contract that Then had presented to her. Among other things, the contract obligated Hard Grove to rent a variety of items from Domestic Linen, including cook shirts, pants, and aprons. The contract specified that Hard Grove would pay Domestic Linen a minimum weekly delivery charge of $146.10.

The contract contained several other noteworthy provisions. In particular, it stated that Hard Grove "warrants that [it] is not under contract with any other party for the furnishing of the items which are the subject matter hereof." Additionally, Hard Grove "also warrant[ed] that [its representative] has read the entire contract, front and back, and has received a copy of this Agreement." Further, "[t]he signatory for the Customer warrant[ed] that [s]he is authorized on behalf of the Customer to execute this Agreement."

(continued)
on January 21, 2011 that the individual co-defendants were dismissed from the litigation with prejudice.

Most importantly, for purposes of the forum issues now before us, the contract contained the following arbitration clause:

> In the event of any controversy or claim in excess of $10,000.00 arising out of or relating to this agreement, including but not limited to questions regarding the authority of the persons who have executed this agreement, the question, controversy or dispute shall be submitted to and settled by arbitration to be held in the city closest to the city in which the branch office of the Company which serves the Customer is located. Said arbitration shall be held in accordance with the then prevailing commercial arbitration rules of the American Arbitration Association except any rules which require the parties to use the American Arbitration Association as their sole Arbitration Administrator. Judgment upon and award rendered by the arbitrator may be entered in any court having jurisdiction thereof. The filing party may use either court or arbitration where the claim is less than $10,000.00. Venue for any court proceeding shall be in the county of the company's branch office servicing the Customer. The judge or arbitrator shall include as part of the award all costs including reasonable attorney fees and arbitration fees of the non-breaching party where it is determined that one of the parties has breached the agreement.
>
> [Emphasis added.]

Apparently, despite Bonilla's execution of what is styled as a requirements contract obligating Hard Grove to obtain certain supplies only from Domestic Linen, Hard Grove continued to use a different uniform supply company. Hard Grove also

apparently did not pay the amounts billed under the contract by Domestic Linen. As a result, Colton, Domestic Linen's counsel in Michigan, wrote Hard Grove a letter in June 2010 demanding $18,993 in liquidated damages. Colton's letter alluded to the fact that Hard Grove could be responsible to reimburse Domestic Linen for its "legal fees and arbitration fees." In August 2010, a different law firm representing Domestic Linen, located in Ohio, transmitted a demand letter to Hard Grove for an even higher sum, $28,517.13, in allegedly accrued charges.

Hard Grove has refused to make payments to Domestic Linen, arguing that the May 12, 2010 form contract, as well as the arbitration provisions within it, are unenforceable for numerous reasons. Several of those arguments are factually supported, at least on their face, by a certification from Bonilla dated November 5, 2010. In particular, Hard Grove maintains that: (1) Bonilla lacked the authority to bind the company to the agreement; (2) Bonilla, whose native language is Spanish,[2] was fraudulently induced by Then to sign the agreement, and he made several misrepresentations to Bonilla; (3) the agreement is a contract of adhesion, and the arbitration clause within it contains numerous unconscionable provisions that are

[2] Domestic Linen contends that Then, who is bilingual, communicated with Bonilla in Spanish.

unenforceable; and (4) there was no meeting of the minds by which Hard Grove agreed to waive its rights to litigate and subject itself to binding arbitration.

According to the narrative in Bonilla's certification, she spoke with Then for approximately ten minutes, at which point he asked her to sign the pre-printed document. Although Bonilla does not deny that she provided her signature, she claims that Then "repeatedly" told her that the document was not a contract, and that it contained "no commitments." She further claims that she told Then that the café was already renting uniforms through another supplier. Bonilla also states that she advised Then that the owners were not on the premises, and that she had no authority to bind the company. Then allegedly left the premises without leaving a copy of the signed contract for Hard Grove.

Domestic Linen disputes these assertions, and maintains that the contract Bonilla signed is binding and enforceable. Domestic Linen also maintains that the dispute, which involves a sum over $10,000, is subject to mandatory arbitration under the terms of the contract.

As the parties' dispute persisted, plaintiffs filed a declaratory judgment action against defendants in the Law Division. The complaint, among other things, requested the court to declare both the May 12, 2010 agreement and the

arbitration clause within it unenforceable. Plaintiffs also asserted their right to a jury trial. Defendants responded with a motion to dismiss or suspend the civil action while the dispute was referred to arbitration pursuant to the contract. Plaintiffs cross-moved to stay the arbitration.

Following oral argument, the trial court granted defendants' motion and denied plaintiffs' cross-motion. In a letter opinion by the trial judge dated January 21, 2011, the trial court concluded that the arbitration provision in the contract was clear and unambiguous, and the matter should be referred to arbitration in light of our State's strong public policy favoring arbitration as an alternative dispute resolution mechanism.

The trial judge rejected plaintiffs' argument that the issues of enforceability, such as their claim that Bonilla lacked authority to bind the café, must be adjudicated exclusively in the courts. Instead, the judge ruled that such issues "should be resolved through the pending arbitration proceeding since they arise out of or relate to the [parties'] agreement." The judge further noted that plaintiffs may pursue discovery in the arbitration process, and "they have failed to demonstrate how proceeding through arbitration rather than through the court system would cause them irreparable harm."

Plaintiffs moved for reconsideration, in part arguing that the dispute is not suitable for arbitration because they have alleged fraud on the part of defendants. After hearing further oral argument, the trial judge denied the motion in an oral decision. In that ruling, the judge amplified her earlier reasons, essentially treating plaintiffs' claims of fraud as directed at the agreement as a whole. The judge noted that section 4 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 4, provides that absent a claim of fraud in the arbitration provision itself, a claim of fraud in the inducement of the contract is a matter to be decided in the first instance by the arbitrator, not by the courts.

Plaintiffs now appeal,[3] arguing that the trial court erred in dismissing their lawsuit and referring the parties' controversy to arbitration. We reject their contentions.

On a national level, section 2 of the FAA, 9 U.S.C. § 2, mandates a "liberal federal policy favoring arbitration." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 103 S. Ct. 927, 941, 74 L. Ed. 2d 765, 785 (1983). In New Jersey, our Legislature reinforced those policies with its 2003

[3] Plaintiffs' appeal of an order compelling arbitration is not premature, as defendants argue in their brief, and is properly before us pursuant to R. 2:2-3(a)(3), as that Rule was amended in 2010. See also Wein v. Morris, 194 N.J. 364, 380 (2008).

enactment of a modified version of the Uniform Arbitration Act, N.J.S.A. 2A:23B-1 to -32 ("the Arbitration Act"). See L. 2003, c. 95. Our case law also has expressed those same policies favoring the use of arbitration as a dispute resolution tool, subject to certain limited exceptions. See, e.g., Martindale v. Sandvik, Inc., 173 N.J. 76, 84 (2002) (citing N.J.S.A. 2A:24-1 to -11); Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 131 (2001).

The Arbitration Act instructs in section 6 that:

> a. An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.
>
> b. The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.
>
> c. An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.
>
> d. If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders.
>
> [N.J.S.A. 2A:23B-6.]

The trial court properly applied these governing principles in this case with respect to plaintiffs' specific contentions that the contract was fraudulently induced and that Bonilla lacked the authority to bind Hard Grove to it. Pursuant to subsection b of N.J.S.A. 2A:23B-6, it correctly determined, at least as a threshold matter, that an agreement between Domestic Linen and Hard Grove "exists." The court also correctly found that the parties' monetary dispute, which exceeds the $10,000 trigger amount in controversy specified in the contract, is "subject to an agreement to arbitrate," as is called for under subsection b of the statute. Ibid.

The trial court's determination to refer the issues raised by plaintiffs contesting the enforceability of the parties' agreement as a whole also was consistent with subsection c of N.J.S.A. 2A:23B-6. In particular, that subsection mandates that "[a]n arbitrator shall decide . . . whether a contract containing a valid agreement to arbitrate is enforceable." N.J.S.A. 2A:23B-6(c). These determinations are subject to ultimate judicial review pursuant to section 23(a)(5) of the Arbitration Act, which prescribes that, "[u]pon the filing of a summary action . . . [a] court shall vacate an award made in the arbitration proceeding if . . . there [is] no agreement to arbitrate." N.J.S.A. 2A:23B-23(a)(5). We construe the language

in subsection (a)(5) to encompass the review of arguments — such as those plaintiffs present here — that the parties never attained an enforceable meeting of the minds. Similarly, defendants could seek judicial review if the arbitrator found the contract provisions unenforceable.

With respect to plaintiffs' specific contention that Bonilla was fraudulently induced by Then to sign the contract, the trial court correctly determined that such a claim must be presented in the first instance to the arbitrator and not to the court. See Van Syoc v. Walter, 259 N.J. Super. 337, 338-39 (App. Div. 1992), certif. denied, 133 N.J. 430 (1993) (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04, 87 S. Ct. 1801, 1806, 18 L. Ed. 2d 1270, 1277 (1967)). "It is not whether the contract can be attacked — but the forum in which the attack is to take place. Unless the arbitration provision itself was a product of fraud, the election [of arbitration] should be enforced." Id. at 339; see also Moore v. Woman To Woman Obstetrics & Gynecology, L.L.C., 416 N.J. Super. 30, 36-37 n.1 (App. Div. 2010); Lederman v. Prudential Life Ins. Co. of Am., Inc., 385 N.J. Super. 324, 338 (App. Div.), certif. denied, 188 N.J. 353 (2006). Here, plaintiffs' claims of fraud are not limited to the arbitration clause within the contract. Instead, they fundamentally assert that Then duped Bonilla

through his misleading statements into agreeing to the contract as a whole.

Plaintiffs' agency-based claims of Bonilla's lack of actual or apparent authority likewise should be addressed in arbitration. Those particular issues, similar to the claims of fraud in the inducement, go to the overall enforceability of the contract. See N.J.S.A. 2A:23B-6(c).

We reach a different conclusion, however, with respect to plaintiffs' argument that the arbitration provision within the contract is unconscionable and therefore unenforceable. Plaintiffs' claim of unconscionability has two aspects: procedural and substantive. A contract provision that is procedurally and substantively unconscionable can be set aside. See Muhammad v. Cnty. Bank of Rehoboth Beach, 189 N.J. 1, 15 (2006), cert. denied, 549 U.S. 1338, 127 S. Ct. 2032, 167 L. Ed. 2d 763 (2007). "[P]rocedural unconscionability . . . 'can include a variety of inadequacies, such as age, literacy, lack of sophistication, hidden or unduly complex contract terms, bargaining tactics, and the particular setting existing during the contract formation process[.]'" Ibid. (quoting Sitogun Holdings, Inc. v. Ropes, 352 N.J. Super. 555, 564-66 (Ch. Div. 2002). A contract term of adhesion, presented by the drafting party to the other party on a take-it-or-leave-it basis, which

plaintiffs contend is the case here, typically involve "some characteristics of procedural unconscionability[.]" Id. at 16. Substantive unconscionability essentially refers to the inclusion within a contract of "harsh or unfair one-sided terms." Id. at 15 (citing Sitogum, supra, 352 N.J. Super. at 564-66). In general, courts must undertake "a careful fact-sensitive examination into [claims of] substantive unconscionability." Id. at 16 (footnote omitted).

Here, plaintiffs first contend that the arbitration clause within the May 2010 contract is unenforceable essentially because, as their briefs assert, "there was gross procedural unconscionability involved in [Bonilla] signing this contract." Plaintiffs allege that Bonilla did not speak English and thereby "could not have understood any of the terms on the papers she was given." Plaintiffs also maintain that Bonilla was told that the preprinted form she signed was not a contract, and that she had no bargaining power in her interactions with Then. Plaintiffs further assert that the mandatory arbitration provision is substantively unconscionable because, among other things, it contains unduly onerous provisions such as a "loser pays" fee and cost-shifting clause, and omits explicit and clear language notifying the customer of its waiver of the right to sue.

Plaintiffs correctly note that under the applicable case law, assertions of the unconscionability of an arbitration provision are customarily to be decided by the courts and not by the arbitrator, because such claims go to the arbitrability of the agreement itself. See Prima Paint, supra, 388 U.S. at 403-04, 87 S. Ct. at 1806, 18 L. Ed. 2d at 1277,; see also First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943-44, 115 S. Ct. 1920, 1923-24, 131 L. Ed. 2d 985, 993-94 (1995). In fact, the courts of our state have made such determinations of unconscionability in various circumstances. See, e.g., Muhammad, supra, 189 N.J. at 22; Delta Funding Corp. v. Harris, 189 N.J. 28, 41 (2006). Such a judicial assessment is consistent with section 6 of the Arbitration Act, which prescribes in subsection (b) that "[t]he court shall decide whether an agreement to arbitration exists or a controversy is subject to an agreement to arbitration," leaving it to the arbitrator in subsection (c) to decide "whether a contract containing a valid agreement to arbitrate is enforceable." N.J.S.A. 2A:23B-6 (emphasis added).

The difficulty here is that the factual underpinnings of plaintiffs' claims of unconscionability — at least the "procedural" aspects of them — are inexplicably intertwined with the material facts at the core of plaintiffs' separate claims of

fraud and lack of agency. All of those claims hinge upon the credibility of Bonilla's account of her allegedly limited role in the company, her alleged language barriers, and her narrative of what Then said when he presented the contract documents to her. Because Bonilla's account of the facts and circumstances is disputed by defendants, the trial court would most likely need to conduct an evidentiary hearing, with sworn testimony from Bonilla, her superiors, and other fact witnesses, in order to test the credibility of her contentions. Such an evidentiary hearing in the trial court could be time-consuming and expensive. Moreover, should the trial court conclude after the evidentiary hearing that the arbitration clause is not unconscionable, the matter would then proceed to arbitration, where Bonilla and some or all of the same witnesses would testify again, pursuant to N.J.S.A. 2A:23B-6(c), about the additional threshold issues of the enforceability of the contract, as well as the merits of Domestic Linen's monetary claims.

To avoid such potentially duplicative, expensive, and time-consuming proceedings in two forums in a case involving a relatively modest amount of money in dispute, we believe it most prudent to remand this matter and have the trial court explore with counsel whether they would elect to have all of the factual

issues respecting unconscionability, fraud, and agency developed in one forum. That forum can be either the trial court or the arbitration, if the parties so choose. If the parties, with the benefit of this court's opinion for guidance, elect to have all of the factual issues decided by the court, then the arbitration is bypassed. Conversely, if the parties elect to have the factual issues developed before the arbitrator in their entirety, then the record can be closed in that proceeding, subject to ultimate judicial review on the limited grounds available under the Arbitration Act or by law. Should the parties choose the latter option, we suggest that the parties arrange for a stenographic transcript of the arbitration proceedings, as authorized by Rule 26 of the AAA Commercial Arbitration Rules. The transcription costs should be borne equally by the parties, subject to potential reallocation at the conclusion of the matter.

That said, if the parties on remand cannot agree on a unitary forum to develop the factual issues, then the court shall first adjudicate the factual issues limited to the alleged unconscionability of the arbitration clause. If the court finds the clause unconscionable and thus unenforceable, then the remaining issues will be litigated in court. On the other hand, if the court concludes that the arbitration clause is not

unconscionable, then the matter shall proceed to arbitration, where the arbitrator shall then address the unresolved claims of fraud in the inducement, lack of agency, and, if those claims fail, the merits of the contract claims.

The trial court shall convene a case management conference with counsel within thirty days of this opinion to explore these options. The court's dismissal of the action is therefore vacated to accommodate the procedures we have outlined.

Affirmed in part, vacated in part, and remanded in part for proceedings consistent with this opinion. Jurisdiction is not retained.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION