IN THE SUPREME COURT OF THE STATE OF NEVADA

KJH & RDA INVESTOR GROUP, LLC; 37TH FLOOR INVESTOR GROUP, LLC; MICHAEL ANDERSON AND MATTHEW ANDERSON; CHARLES AND FERNE AVILA AND MICHAEL GALASSO; PIERRE BAIN; IBRAHIM AND LAURA BARLAJ; DAN BIRDSALL; HIN AND WING SUNG CHAN; TERENCIA CONEJERO; DIANE B. FAULCONER; FCF, LLC; STEPHEN J. GUYON; OGANES JOHN HAKOPYAN; ZIA U. KHAN; MARKAR KARATAS AND NURHAN CELIK; FRANK AND CAROL KEANE; DENNIS LEUNG AND JIYEN SHIN; K.B. LIM; ANITA AND TAI CHI LUK; LETICIA L. MAGRI; ANAHIT AND ALEXANDER MANDOYAN; AOKI MICHI II, LLC; SUSAN AND MARK MIGNOT; MARY MOMDZHYAN; BB VENTURES, LLC; ED NARVAEZ; DANE R. PHILLIPS; CRAIG A. PRIMAS; JAMES AND LAURINDA RICK; DOUGLAS SCHOEN; PGR ENTERPRISES, LLC; DIMITRISTA H. TOROMANOVA; 38TH FLOOR INVESTOR GROUP, LLC; AND DAVID L. VADIS,
Petitioners,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE MARK R. DENTON, DISTRICT JUDGE,
Respondents,
and
TURNBERRY/MGM GRAND TOWERS, LLC,

No. 51159

FILED

APR 22 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

09-10012

Real Party in Interest.

ORDER DENYING PETITION

This is an original petition for a writ of mandamus challenging a district court order granting a motion to compel arbitration. [1]

This petition arises from a dispute between petitioners KJH & RDA Investor Group, LLC, et al. ("KJH") and real party in interest Turnberry/MGM Grand Towers, LLC ("MGM") over the sale of condominium units that KJH claims were fraudulently marketed to buyers as investment securities. Enforcing the mandatory arbitration clauses in the buyers' purchase agreements, the district court compelled arbitration of this dispute and this petition followed.

In this petition, KJH challenges the district court's decision to compel arbitration, contending that the arbitration clauses in their purchase agreements are unconscionable and unenforceable as a matter of law under NRS 90.840(3). For the following reasons, however, we disagree with both contentions and conclude that this dispute was not improperly submitted to arbitration. Accordingly, we order the petition denied. The parties are familiar with the facts and we do not recount them here except as necessary to our disposition.

Unconscionability

KJH argues that the mandatory arbitration clauses in their purchase agreements are unenforceable as unconscionable. Reviewing

[1]The Honorable Kristina Pickering, Justice, did not participate in the decision of this matter.

this issue de novo, see D.R. Horton, Inc. v. Green, 120 Nev. 549, 553, 96 P.3d 1159, 1162 (2004), we disagree.

Agreements to arbitrate are unenforceable if they are both procedurally and substantively unconscionable. Id. at 553-54, 96 P.3d at 1162. While both elements must be present to render an arbitration clause invalid, an agreement to arbitrate will be upheld in the total absence of procedural unconscionability. See ("[C]ontracts . . . in which there is no procedural unconscionability[,] . . . no matter how one-sided the contract terms, . . . will not [be] disturb[ed] . . . . [I]t is not the court's place to rectify these kinds of errors or asymmetries.").

As we noted in D.R. Horton, an arbitration clause is procedurally unconscionable "when a party lacks a meaningful opportunity to agree to the clause terms either because of unequal bargaining power, as in an adhesion contract, or because the clause and its effects are not readily ascertainable upon a review of the contract." 120 Nev. at 554, 96 P.3d at 1162. The gist of this element "focuses on two factors: oppression and surprise." Ferguson v. Countrywide Credit Industries, Inc., 298 F.3d 778, 783 (9th Cir. 2002).

Here, despite KJH's efforts to characterize the arbitration clauses in their purchase agreements as procedurally unconscionable, neither factor is supported on this record.[2]

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[2]In a September 15, 2008, procedural order, we took judicial notice of the fact that two declarations of condominium purchasers had been filed in the federal district court case, Sussex v. Turnberry/MGM Grand Towers, Case No. 2:08-CV-00773, involving the same defendant, similar claims, and the same issue regarding the same arbitration provision. However, because these declarations were not presented to the district

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Although KJH asserts that the arbitration clauses were adhesive and, therefore, oppressive, the purchase agreements allowed for written amendments and presumed that buyers such as KJH had the chance to consult with an attorney—qualities that imply that the arbitration clauses at issue here were negotiable and that a meaningful choice could have been exercised as to their terms. See Burch v. Dist. Ct., 118 Nev. 438, 442, 49 P.3d 647, 649 (2002) ("The distinctive feature of an adhesion contract is that the weaker party has no choice as to its terms." (internal quotation marks omitted)).

Likewise, with respect to bargaining power, we fail to perceive a vast disparity. In contrast to the average consumer, who faces adhesive contracts as a reality of obtaining basic goods and services, KJH is comprised of self-described real estate investors who purchased one and, in some cases, multiple luxury condominiums—not as personal residences—but as speculative rental properties.

Moreover, we disagree that the arbitration clauses and their consequences were as surprising as KJH claims.[3] Although the clauses

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court in this matter, we declined to take judicial notice of any facts, legal principles, or arguments espoused in the declarations, as they were not part of the district court record. Correspondingly, in contrast to the Sussex litigation, these declarations are not part of the record in this writ proceeding and have no bearing on our decision here.

[3]Regarding consequences, KJH claims that it lacked notice of the rights that it was forfeiting under Nevada law, in particular, the right to a jury trial, because those rights were not individually identified in the arbitration clauses. Nevertheless, MGM had no duty to apprise KJH in detail of every right that it was waiving. See D.R. Horton, 120 Nev. at

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were located under the "MISCELLANEOUS" heading on page nine of a twelve-page purchase agreement, they were set off in their own underlined sub-headings labeled "Arbitration" and were in the same size type as surrounding provisions. Thus, while not exactly highlighted, neither were the clauses attempting to escape notice.

Not only were the clauses not inconspicuous, the record more than reasonably suggests that the clauses were read and presumably understood, as the purchase agreements were signed and each individual page of the agreements—including the page containing the arbitration clause—was initialed by hand. Furthermore, unlike the residential homebuyers in D.R. Horton, KJH—a group of self-avowed real estate investors—had more reason to anticipate the presence of an arbitration clause (especially if KJH truly believed that it was purchasing a more complicated investment security), and was better positioned to readily ascertain such an agreement's meaning. Thus, despite its claim to have read the purchase agreements only for "mistakes and obvious errors," we are not persuaded that KJH was deprived of an opportunity to meaningfully review the arbitration clauses.

For these reasons, we fail to perceive the presence of oppression or surprise on this record, and therefore conclude that the

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556-57, 96 P.3d at 1164. Moreover, by virtue of providing that arbitration would "be the exclusive means for resolving disputes which the parties cannot resolve," and "shall be conducted under the . . . [r]ules of the [AAA]" before an arbitrator whose award "shall be final," the arbitration clauses adequately notified KJH that it was waiving certain important rights, including the right to have its claims tried before a jury. See id.

arbitration clauses are not procedurally unconscionable. Given that the total absence of procedural unconscionability is a dispositive consideration, see Gentry v. Superior Court, 165 P.3d 556, 572-73 (Cal. 2007), we agree with the district court that the arbitration clauses at issue here are not unenforceable as unconscionable.[4]

NRS 90.840

Alternatively, KJH asserts that the arbitration clauses are unenforceable as a matter of law under NRS 90.840, which it claims prohibits the arbitration of disputes involving "unregistered" securities. In our view, this argument fails.

According to NRS 90.840(2), contractual provisions purporting to waive compliance with NRS Chapter 90 (Nevada's Uniform Securities Act) are unenforceable. Nevertheless, under NRS 90.840(3), two exceptions exist: "[1] A provision in a contract containing an agreement to arbitrate or [2] a provision for choice of law in a contract between persons all of whom are engaged in the securities business."

However, mistakenly reading the first exception as exempting arbitration agreements only between "persons all of whom are engaged in the securities business," KJH assumes that NRS 90.840(3) must therefore

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[4]Although KJH argues that the district court improperly failed to conduct a full-blown evidentiary hearing regarding unconscionability, this fails to present an issue on appeal as such a hearing never appeared to be requested below. In any event, an evidentiary hearing is discretionary, not an entitlement, see NRS 38.221(1)(b), and forgoing such a hearing under the circumstances was harmless as it would have added little to the record beyond KJH's 74-page complaint and the 46 sworn declarations submitted with its opposition.

void arbitration agreements if they pertain to controversies involving "unregistered" securities.

Despite its efforts, KJH's interpretation of this statute fails as it contradicts the uniform provision from which NRS 90.840(3) is derived, which treats arbitration agreements and choice-of-law provisions as separate exceptions to the general rule against contractual waivers, see Unif. Securities Act § 802(b) (1985), 7 U.L.A. 317, cmt. 2 (1985), and conflicts with interpretations of § 14 of the 1933 Securities Act, the federal analogue to NRS 90.840. See Rodriguez de Quijas v. Shearson/Am. Exp., 490 U.S. 477, 482-83 (1989).

In addition to failing in its own right, KJH's argument regarding NRS 90.840(3) fails to pose an issue of arbitrability since addressing it requires a determination of whether the purchase agreements pertained to "unregistered" securities, and therefore a determination of the legality of these contracts as a whole—an issue that is properly left to the arbitrator. See NRS 38.219(3) ("An arbitrator shall decide whether . . . a contract containing a valid agreement to arbitrate is enforceable."); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 449 (2006) (an arbitration agreement is severable and enforced separately from a contract). Accordingly, given its several infirmities, and its failure to pose an issue of arbitrability, we conclude that KJH's argument regarding NRS 90.840 is meritless.

Based on the above, we conclude that the mandatory

arbitration clauses contained in the purchase agreements entered into by KJH are enforceable. Accordingly, we

ORDER the petition DENIED.[5]

Hardesty, C.J.

Parraguirre, J.

Douglas, J.

Cherry, J.

Saitta, J.

Gibbons, J.

cc: Hon. Mark R. Denton, District Judge
Blumenthal & Nordrehaug
Gerard & Associates
Morris Peterson/Las Vegas
Eighth District Court Clerk

[5]Having denied this petition, we deny MGM's February 26, 2009, motion to strike petitioners' response as moot.