IN THE SUPREME COURT OF THE STATE OF NEVADA

U.S. HOME CORPORATION, A DELAWARE CORPORATION; LENNAR CORPORATION, A DELAWARE CORPORATION; AND LENNAR NEVADA, INC., A NEVADA CORPORATION,
Appellants,
vs.
MICHAEL AND HELEN BERMAN, INDIVIDUALLY; PAUL AND LINDA CUSSICK, INDIVIDUALLY; JEFFREY AND GERALDINE MUNTIS, INDIVIDUALLY; ROGER AND ESTHER PRATT, INDIVIDUALLY; AND JAMES AND JOYCE SIMMONS, INDIVIDUALLY,
Respondents.

No. 40219

FILED

DEC 22 2004

CLERK OF SUPREME COURT

DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a motion to compel arbitration. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

This appeal arises out of two separate arbitration agreements signed by respondents Michael and Helen Berman, Paul and Linda Cussick, Jeffrey and Geraldine Muntis, Roger and Esther Pratt, and James and Joyce Simmons (hereinafter "homebuyers") in connection with new home purchases from appellants U.S. Home Corporation, Lennar Corporation, and Lennar Nevada, Inc. ("the builder"). The first arbitration agreement, which was signed along with the original purchase documents, defaulted to a warranty arbitration agreement to be provided by the builder. The second arbitration agreement, set forth in the

builder's warranty program, was signed at closing. The homebuyers eventually sued appellants for alleged construction defects. The district court denied the builder's motion to compel arbitration, citing this court's decision in Burch v. District Court.[1]

DISCUSSION

On appeal, the builder contends that the arbitration agreement contained in the warranty program was signed prior to closing, as opposed to four months after closing as in Burch, and therefore, the agreement is not procedurally unconscionable. We disagree.

Under NRS 38.205(1)(a), an order denying a motion to compel arbitration may be directly appealed.[2] "Whether a dispute is arbitrable is essentially a question of construction of a contract. Thus, the reviewing court is obligated to make its own independent determination on this issue, and should not defer to the district court's determination."[3]

Disputes are presumptively arbitrable, and doubt concerning the arbitrability of a dispute should be resolved in favor of arbitration.[4] Nevada arbitration statutes governing this case prohibit denial of

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[1]118 Nev. 438, 49 P.3d 647 (2002).

[2]NRS 38.205 (repealed 2001; current version at NRS 38.247). The previous statute applies here pursuant to NRS 38.216, since the agreements at issue were entered into before October 1, 2001.

[3]Clark Co. Public Employees v. Pearson, 106 Nev. 587, 590, 798 P.2d 136, 137 (1990).

[4]Int'l Assoc. Firefighters v. City of Las Vegas, 104 Nev. 615, 618, 764 P.2d 478, 480 (1988).

arbitration based on the relative merits of the underlying dispute.[5] Nevertheless, in Burch, this court held that a court "need not, however, enforce a contract, or any clause of a contract, including an arbitration clause, that is unconscionable."[6]

Generally, for a court to exercise its discretion to refuse to enforce a contract or clause as unconscionable, both procedural and substantive unconscionability must be present.[7] However, the two types of unconscionability need not be present in the same degree to support a finding of overall unconscionability.[8] Where the procedural unconscionability is great, less evidence of substantive unconscionability is required, and vice versa.[9]

This court recently provided guidance for considering the procedural and substantive unconscionability of arbitration clauses in D.R. Horton, Inc. v. Green.[10] An arbitration clause is procedurally unconscionable when a party lacks a meaningful opportunity to agree to the terms either because of unequal bargaining power, or when the effects

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[5]NRS 38.045(5) (repealed 2001; applies to this case pursuant to NRS 38.247), which provides that an "order for arbitration shall not be refused on the ground that the claim in issue lacks merit or bona fides or because any fault or grounds for the claim sought to be arbitrated have not been shown."

[6]Burch, 118 Nev. at 442, 49 P.3d at 649.

[7]Id.

[8]Id.

[9]Id.

[10]120 Nev. ____, 96 P.3d 1159 (2004).

of the clause are not readily ascertainable upon review of the contract.[11] An arbitration clause must be conspicuous, and must put a purchaser on notice that he or she is waiving important rights under Nevada law.[12]

The arbitration agreement contained in the builder's warranty here was nearly identical to that voided as unconscionable in Burch.[13] The only significant difference involves the time frames within which the homebuyers signed acknowledgements of receipt of the warranties and warranty booklets containing the arbitration agreements. Thus, although the procedural unconscionability presented here is less egregious than that presented in Burch, this record still includes evidence of procedural unconscionability.

First, the warranty arbitration provision in this case is located on page six of a thirty-page warranty booklet, with nothing conspicuous to set the provision or its terms apart from any other language in the warranty booklet. Second, the homebuyers were told that the warranty was a bonus, even though it actually stripped the homebuyers of some of their rights under Nevada law, including the implied warranty of habitability, and some of the remedies of Nevada's construction defect statutes.[14] Third, although the homebuyers each signed a warranty enrollment form that acknowledged receipt of and consent to the terms of the arbitration agreement, there is no evidence that the homebuyers had

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[11]Horton, 120 Nev. at ____, 96 P.3d at 1162.

[12]Id. at ____, 96 P.3d at 1164.

[13]118 Nev. 438, 49 P.3d 647 (2002).

[14]NRS 40.655(1)(c-e).

any meaningful opportunity to bargain for any terms of the arbitration agreement, or the warranty itself. Indeed, there is scant evidence that the homebuyers understood which arbitration agreement governed their warranty rights.

Substantive unconscionability focuses on the one-sidedness of the contract terms.[15] The same oppressive, one-sided terms present in Burch were present here. Most importantly, the builder's insurer enjoyed the unilateral and exclusive right to determine the rules of arbitration and to select the arbitrator.

CONCLUSION

We conclude that under the circumstances presented here, the arbitration agreements in this case are unenforceable based upon considerations of procedural and substantive unconscionability. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Rose

_____, J.
Maupin

_____, J.
Douglas

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[15]Horton, 120 Nev. at ____, 96 P.3d at 1162-63 (quoting Ting v. AT&T, 319 F.3d 1126, 1149 (9th Cir.), cert. denied, 540 U.S. 811 (2003); Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 893 (9th Cir.), cert. denied, 535 U.S. 1112 (2002)).

cc: Hon. Valorie Vega, District Judge
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