Filed 4/3/15 Chamberlin v. Crest Construction CA2/4

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

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| PATRICIA CHAMBERLAIN,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>CREST CONSTRUCTION AND REMODELING, INC. et al.,<br><br>Defendants and Appellants. | B258586<br><br>(Los Angeles County Super. Ct. No. BC537999) |

APPEAL from an order of the Superior Court of Los Angeles County, Richard Fruin, Judge. Affirmed.

GabrielSalomons, Jonathan G. Gabriel and David S. Mayes for Defendants and Appellants.

Consumer Action Law Group, Lauren Rode, Kenley Dygert and Yelena Gurevich for Plaintiff and Respondent.

Appellants Crest Construction and Remodeling, Inc. ("Crest") and Isaac Sastiel appeal the order denying their motion to compel arbitration of respondent Patricia Chamberlain's claims. Chamberlain sued appellants after Crest performed extensive remodeling in her home, alleging most of it was done without her knowledge and consent and that appellants, through forgery or fraud, induced her to take out a reverse mortgage to pay for the work. The trial court found that some of Chamberlain's claims did not fall within the scope of the parties' arbitration agreement and that the arbitration agreement was unconscionable as to the claims that were within its scope. We affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

### I. Appellants' Solicitations, the Home Improvement Contract, and the Arbitration Agreement

In her verified complaint,[1] Chamberlain alleged that in May 2012—when she was 82 years old—Sastiel, a Crest manager, knocked on her door and told her that her home looked like it needed remodeling. For the following month, Sastiel continuously called her to ask if she needed anything, occasionally stopped in to check on her, and told her he was there to help her. Chamberlain grew to trust Sastiel.

In June 2012, Chamberlain verbally agreed to have appellants remodel her bathroom by updating her bathtub and installing a detachable showerhead and new flooring. Appellants later convinced her to have a new water heater installed. Sastiel told Chamberlain that she could pay for construction costs by obtaining a reverse mortgage from the United States Department of Housing and Urban Development (HUD).

Chamberlain alleged that on or about June 19, 2012, Sastiel dropped off and subsequently picked up an envelope containing documents. Chamberlain admits that she signed the included home improvement contract, but she does not recall signing or dating the other documents. She nonetheless attached to her complaint three Crest documents entitled "Home Improvement Contract," "Three-Day Right to Cancel," and "Arbitration

[1] Unless otherwise stated, the facts in the background discussion are drawn from Chamberlain's verified complaint, which she signed under penalty of perjury.

of Disputes," all of which are dated June 19, 2012 and bear a "Patricia Chamberlain" signature.

### A. The Home Improvement Contract

The one-page home improvement contract between Crest and Chamberlain describes the work to be performed as a "bathtub remodel," with an approximate start date of June 21, 2012 and completion date of July 21, 2012. The contract states a price of $15,000 for the remodel.

The contract contains a clause about financing: "Contractor may, if requested, refer owner to a finance company, but any negotiations or arrangements between owner and finance company is [sic] owners [sic] sole responsibility. Unless specifically stated above that this Agreement is subject to approval of financing, this Agreement is not subject to obtaining or approval of financing." The home improvement contract does not state anywhere that it is subject to approval of financing.

The home improvement contract states that the "Entire Agreement is contained herein. NO ORAL REPRESENTATION shall be considered part of this contract unless listed in writing." However, it explicitly incorporates the arbitration agreement described below. It also contains a box stating, "ARBITRATION [¶] OWNER: Initial this box if you agree to arbitration. Review the 'Arbitration of Disputes' section attached." Chamberlain's initials are printed in the box.

### B. The Arbitration Agreement

The first clause of the separate one-page arbitration agreement provides for arbitration under the construction industry rules of the American Arbitration Association ("AAA"):

> "ARBITRATION OF DISPUTES: ANY CONTROVERSY OR CLAIM ARISING OUT OF OR RELATED TO THIS CONTRACT, OR BREACH THEREOF, SHALL BE SETTLED BY BINDING ARBITRATION IN ACCORDANCE WITH THE CONSTRUCTION INDUSTRY ARBITRATION RULES OF THE AMERICAN ARBITRATION

> ASSOCIATION, AND JUDGMENT UPON THE AWARD RENDERED BY THE ARBITRATOR(S) MAY BE ENTERED IN ANY COURT HAVING JURISDICTION THEREOF. . . ."

Halfway down the page, the arbitration agreement contains a similar boilerplate clause providing for arbitration under the uniform rules for binding arbitration of the Better Business Bureau of the Southland ("BBB"):

> "MANDATORY BINDING ARBITRATION, ANY CONTROVERSY OR CLAIM ARISING OUT OF OR RELATING TO THIS CONTRACT OR THE BREACH THEREOF SHALL BE SETTLED BY ARBITRATION IN ACCORDANCE WITH THE UNIFORM RULES FOR BINDING ARBITRATION OF THE BETTER BUSINESS BUREAU OF THE SOUTHLAND (PUBLISHED ON OUR WEBSITE AT WWW.LABBB.ORG) IN EFFECT AT THE TIME OF INITIATION OF ARBITRATION, AND THE JUDGMENT UPON THE AWARD RENDERED BY THE ARBITRATOR MAY BE ENTERED IN ANY COURT HAVING JURISDICTION THEREOF. . . ." [2]

Chamberlain's signature is at the bottom of the page, and her initials are printed after the statement, "I agree to Arbitration." Neither the rules of the AAA nor those of the BBB are part of the record.

## II. Appellants' Work on Chamberlain's Home and the Addenda

Chamberlain alleges that appellants began work on her bathroom on or about June 21, 2012. The remodel did not meet her expectations. Appellants demolished Chamberlain's entire bathroom, ripped out her bathtub, and installed a stand-only shower in its place. Chamberlain, however, alleges that she would never have agreed—and does not think she did agree—to installation of a stand-only shower because she has trouble standing upright and showering is painful.

During the bathroom remodel, Sastiel informed Chamberlain that her kitchen also needed remodeling. Trusting Sastiel's judgment, Chamberlain verbally agreed to have appellants install new countertops, redo the cabinets, repair the floor, and install a new

[2] As discussed further below, these two clauses are internally inconsistent, and there is nothing in the arbitration agreement or any of the other documents in the record that attempts to reconcile them or explain which should control.

faucet and garbage disposal. When appellants began work, they demolished the entire kitchen. Chamberlain was unaware that such extensive demolition would occur.

Appellants performed other work at Chamberlain's home, including changing the front door lock; reinforcing the windows and doors and the front gate; rewiring the house; installing a new panel box, a new water heater, and two smoke detectors; and removing a small amount of mold. Chamberlain alleges that out of all of this work, she only knew about and consented to installation of a new water heater. Chamberlain also believes that appellants overcharged her for all of their work.

Chamberlain attached to her complaint several documents entitled "Continuation/Addendum," which purport to be addenda to the original home improvement contract between Crest and Chamberlain. They list additional work to be performed and its estimated cost. Each of these addenda bears a "Patricia Chamberlain" signature. However, Chamberlain alleges that she does not recall signing these documents and believes that appellants forged her signatures without her knowledge.

Each addendum states near the top, "[t]his is a Continuation or Addition to original Home Improvement Contract dated _____, 20 __." Only one of the addenda has the date of the original home improvement contract written in the blanks. Three have other dates inserted: July 9, 2012, July 24, 2012, and October 1, 2012. Five of the addenda do not contain any date.

The following language is found near the bottom of each addendum: "Customer further understands that the entire agreement is contained herein. No oral representation shall be considered part of this contract unless listed in writing. All other terms and conditions stated in original contract to remain the same."

## III. The HUD Reverse Mortgage and Crest Invoices

Crest never asked Chamberlain for payment during the three-month period in which appellants worked on her home. After the appellants' work was completed around September 2012, Sastiel informed Chamberlain that the total amount due to Crest was $155,000. Chamberlain alleges that she was blindsided by this large sum.

On or about October 2, 2012, a HUD reverse mortgage loan (the "Loan") was taken out in Chamberlain's name, secured by a deed of trust, recorded, and ratified by both HUD and defendant Security One Lending ("Security One"), which is not a party to this appeal. The Loan and deed of trust also were notarized by defendant Neely Ward ("Ward"), also not a party to this appeal. The Loan purported to extend to Chamberlain a lump sum line of credit in the amount of $166,322.75.

Chamberlain does not recall signing the Loan or deed of trust. Nor did she authorize anyone to sign the Loan or deed of trust on her behalf. She believes that the Loan and all documents securing it, including the deed of trust, were forged by Sastiel or another Crest employee, or, alternatively, that she was induced to sign documents she did not understand or agree to.

Chamberlain alleges that in November 2012, when the Loan proceeds were distributed, Sastiel personally drove Chamberlain to her bank so she could wire $155,000 from her own account to a bank account in his name.

In January 2013, Chamberlain received five vague invoices from Crest totaling $122,480. Chamberlain realized that she had transferred $155,000 from her account—approximately $33,000 more than the invoiced amount—and from January 2013 until approximately September 2013, she continuously called appellants to inquire about her excess payment. Appellants rarely returned her calls. When she was able to speak to Sastiel, he ignored her inquiries about the missing $33,000.

## IV. Chamberlain's Complaint and Appellants' Motion to Compel Arbitration

On February 28, 2014, Chamberlain filed her verified complaint against Crest and Sastiel as well as against Security One and Ward, who are not parties to this appeal. She asserts six causes of action: financial elder abuse and injunctive relief under the Consumer Legal Remedies Act against all defendants; fraud and deceit against Crest, Sastiel, and Ward; conversion and rescission of contract against Crest and Sastiel; and quiet title against Security One.

On June 2, 2014, counsel for Crest, Sastiel, and Ward sent a letter to Chamberlain's counsel demanding that Chamberlain arbitrate her claims with the AAA in

accordance with the arbitration agreement. Chamberlain's counsel responded with a letter stating that any arbitration agreement Chamberlain might have signed was unconscionable and that she would not agree to arbitration.

On June 10, 2014, Crest and Sastiel filed a motion to compel arbitration pursuant to Code of Civil Procedure, section 1281.2, contending that the arbitration agreement was enforceable under California law, that each of Chamberlain's claims was subject to arbitration, that public policy supports enforcement of the arbitration agreement, and that the court should stay the action pending arbitration.[3] Sastiel submitted a declaration in support of the motion stating that he provided the home improvement contract and arbitration agreement to Chamberlain, that he explained the documents to her, and that he observed her sign both documents. Chamberlain opposed the motion, arguing that the arbitration agreement was unconscionable and that there was fraud in the inducement of the overall contract. Chamberlain relied exclusively on the allegations of her verified complaint to support her opposition.

After a hearing on July 22, 2014, the trial court denied appellants' motion.[4] The court held that the arbitration agreement was procedurally and substantively unconscionable. The court also found that Chamberlain's claims that she was induced to sign the loan documents did not fall within the scope of the arbitration agreement.

Appellants timely appealed.

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[3] Ward did not join the motion to compel despite being a party to the demand letter.

[4] The record does not contain a transcript of the hearing or any formal order. However, the parties agree that the court's tentative order, which is included, reflects the order of the court.

## DISCUSSION

### I. Standard of Review[5]

On a motion to compel arbitration, "[t]he petitioner bears the burden of proving the existence of a valid arbitration agreement by the preponderance of the evidence, and a party opposing the petition bears the burden of proving by a preponderance of the evidence any fact necessary to its defense. [Citation.] In these summary proceedings, the trial court sits as a trier of fact, weighing all the affidavits, declarations, and other documentary evidence, as well as oral testimony received at the court's discretion, to reach a final determination. [Citation.]" (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972.)

"There is no uniform standard of review for evaluating an order denying a motion to compel arbitration. [Citation.] If the court's order is based on a decision of fact, then we adopt a substantial evidence standard. [Citations.] Alternatively, if the court's denial rests solely on a decision of law, then a de novo standard of review is employed. [Citations.]" (*Robertson v. Health Net of California, Inc.* (2005) 132 Cal.App.4th 1419, 1425.) In this case, the court's denial was based on its legal conclusions that the arbitration agreement was unconscionable and that the reverse mortgage claims did not fall within the scope of the arbitration agreement. Neither of these conclusions was based on disputed evidence. Accordingly, we review the court's order de novo.

### II. The Validity and Scope of the Arbitration Agreement

"'[W]hen considering a motion to compel arbitration, the court must initially "determine whether the parties agreed to arbitrate the dispute in question." [Citation.] "This determination involves two considerations: (1) whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute falls within the scope of that

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[5] The parties have proceeded under California law, and neither side argues that the dispute is subject to federal preemption under the Federal Arbitration Act (9 U.S.C. § 1 et seq.), which applies to contracts in interstate commerce. Therefore, "[w]e resolve their dispute under state law standards . . . . [Citation.]" (*Htay Htay Chin v. Advanced Fresh Concepts Franchise Corp.* (2011) 194 Cal.App.4th 704, 707-708.)

arbitration agreement." [Citation.]' [Citations.]" (*Bruni v. Didion* (2008) 160 Cal.App.4th 1272, 1283 (*Bruni*).)

We find that the agreement to arbitrate is valid. Chamberlain admits that she signed the original home improvement contract and appellants submitted unrebutted evidence that Chamberlain signed the arbitration agreement at the same time.[6] Further, the home improvement contract clearly refers to and incorporates the arbitration agreement, and Chamberlain's initials appear in the box in the home improvement contract indicating that she agreed to arbitration.[7] Appellants have met their burden of establishing that a valid agreement to arbitrate exists.

However, not all of Chamberlain's claims fall within the scope of the arbitration agreement. The court found that Chamberlain's claims arising from her allegation that she was induced to execute a reverse mortgage do not fall within the scope of the arbitration agreement. We agree.

The arbitration agreement by its terms applies to "any controversy or claim arising out of or related[8] to [the home improvement] contract, or breach thereof." This is a broad clause and courts have interpreted similar language as extending beyond contract claims to encompass non-contract causes of action arising out of or relating to the contractual

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[6] Even if we accept as evidence Chamberlain's allegations in her verified complaint, those allegations do not contradict Sastiel's declaration stating that he observed her signing the arbitration agreement in his presence. Chamberlain could have signed the arbitration agreement and not recalled doing so.

[7] Although we may uphold the trial court's decision on grounds not discussed by the court (*Melchior v. New Line Productions, Inc.* (2003) 106 Cal.App.4th 779, 787), Chamberlain's contention that the arbitration agreement is not enforceable because there was fraud in the inducement of the overall contract is not persuasive. Fraud in the inducement of the overall contract (as opposed to fraud in the inducement of the arbitration agreement itself) is for the arbitrator to decide and does not constitute a basis for denying a motion to arbitrate. (*Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 Cal.3d 312, 323; *Bruni, supra*, 160 Cal.App.4th at pp. 1283-1284.)

[8] The second arbitration clause in the arbitration agreement replaces "related" with "relating."

relationship. (See, e.g., *EFund Capital Partners v. Pless* (2007) 150 Cal.App.4th 1311, 1322-1326 (*EFund*).) Appellants contend without analysis or citation to authority that "[w]hile several of [Chamberlain's] claims are styled as something other than contractual claims, all of the claims are based on the contractual relationship between the parties and the work performed at [Chamberlain's] house" and thus are arbitrable disputes. We are not persuaded.

Chamberlain's causes of action for conversion, quiet title, and injunctive relief under the Consumer Legal Remedies Act are entirely premised on her allegations that appellants either forged her signature to take out a $166,000 reverse mortgage on her home without her authorization or induced her to take it out.[9] Moreover, although Chamberlain's causes of action for financial elder abuse and fraud and deceit contain some allegations of unauthorized or overcharged work at Chamberlain's house, the gravamen of those causes of action is the reverse mortgage allegations.[10]

Chamberlain's reverse mortgage allegations do not arise out of or relate to the home improvement contract. That contract covers work performed at Chamberlain's house and compensation for the work. It has nothing to do with the source of Chamberlain's funds or financing. In fact, the home improvement contract expressly disclaims any responsibility or obligation related to the financing of work on Chamberlain's home. It states, "any negotiations or arrangements between owner and finance company is [sic] owners [sic] sole responsibility. . . . [T]his agreement is not subject to obtaining or approval of financing." In light of this disclaimer, the arbitration agreement cannot reasonably be interpreted to apply to Chamberlain's allegations

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[9] Additionally, Chamberlain brings her cause of action for quiet title only against Security One. That cause of action is not subject to the arbitration agreement because Security One is not a party to it. (See *Ronay Family Limited Partnership v. Tweed* (2013) 216 Cal.App.4th 830, 837 ["The general rule is that only a party to an arbitration agreement may enforce it. [Citations.]"].)

[10] As discussed below, to the extent any allegations within the financial elder abuse and fraud and deceit causes of action fall within the scope of the arbitration agreement, we find that the arbitration agreement is unconscionable as to those allegations.

regarding appellants' conduct in forging her signature or inducing her to obtain financing through a reverse mortgage on her home. (See *Employers Reinsurance Co. v. Superior Court* (2008) 161 Cal.App.4th 906, 919 [on review, "[w]e consider the contract as a whole and interpret the language in context, rather than interpret a provision in isolation"].)

We acknowledge that "California has a strong public policy in favor of arbitration" (*Coast Plaza Doctors Hospital v. Blue Cross of California* (2000) 83 Cal.App.4th 677, 686) and "doubts concerning the scope of arbitrable issues are to be resolved in favor of arbitration" (*Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street, supra*, 35 Cal.3d at p. 320.) However, the strong policy in favor of arbitration may not be used to force arbitration of disputes the parties cannot be presumed to have agreed to arbitrate. (See *Thompson v. Toll Dublin, LLC* (2008) 165 Cal.App.4th 1360, 1370.) The interpretation of an arbitration agreement must give effect to the mutual intention of the parties, and this intent is to be inferred, if possible, from the written provisions of the agreement. (*EFund, supra*, 165 Cal.App.4th at p. 1321.) Here, the financing disclaimer in the home improvement contract, coupled with the terms of the arbitration agreement, make it clear that the parties did not intend to arbitrate Chamberlain's reverse mortgage claims. Accordingly, Chamberlain's causes of action for financial elder abuse, fraud and deceit, conversion, quiet title, and injunctive relief under the Consumer Legal Remedies Act are not arbitrable.

## III. Unconscionability

### A. The Law of Unconscionability

The doctrine of unconscionability is codified in Civil Code section 1670.5, subdivision (a), which states: "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."

"'In California, two separate approaches have developed for determining whether a contract or provision thereof is unconscionable.' [Citation.]" (*Parada v. Superior Court* (2009) 176 Cal.App.4th 1554, 1568 (*Parada*).) The first was outlined by the California Supreme Court in *Graham v. Scissor-Tail, Inc.* (1981) 28 Cal.3d 807 (*Graham*). (*Parada*, *supra*, 176 Cal.App.4th at p. 1568.) The *Graham* "[u]nconscionability analysis begins with an inquiry into whether the contract is one of adhesion. [Citations] 'The term [contract of adhesion] signifies a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.' [Citation.] If the contract is adhesive, the court must then determine whether 'other factors are present which, under established legal rules—legislative or judicial—operate to render it [unenforceable].' [Citation.] 'Generally speaking, there are two judicially imposed limitations on the enforcement of adhesion contracts or provisions thereof. The first is that such a contract or provision which does not fall within the reasonable expectations of the weaker or "adhering" party will not be enforced against him. [Citations.] The second—a principle of equity applicable to all contracts generally—is that a contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or "unconscionable."' [Citation.] Subsequent cases have referred to both the 'reasonable expectations' and the 'oppressive' limitations as being aspects of unconscionability. [Citation.]" (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 113 (*Armendariz*).)

A separate test described in *A&M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 486-487 (*A&M Produce*) characterizes unconscionability as having "'both a "procedural" and a "substantive" element,' the former focusing on '"oppression"' or '"surprise"' due to unequal bargaining power, the latter on 'overly harsh' or '"one-sided"' results. [Citation.]" (*Armendariz*, *supra*, 24 Cal.4th at p. 114.) "'The prevailing view is that [procedural and substantive unconscionability] must both be present in order for a court to exercise its discretion to refuse to enforce a contract or

clause under the doctrine of unconscionability.' [Citation.] . . . [T]he more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa."[11] (*Armendariz, supra,* 24 Cal.4th at p. 114.)

Courts commonly use the two tests to inform one another. For instance, "[t]he procedural element of an unconscionable contract generally takes the form of a contract of adhesion . . . ." (*Little, supra*, 29 Cal.4th at p. 1071.) And "failure to pass the 'reasonable expectations' test is generally treated as the equivalent of substantive unconscionability. [Citation.]" (*Bruni, supra,* 160 Cal.App.4th at pp. 1289-90; see also *Gutierrez v. Autowest, Inc.* (2003) 114 Cal.App.4th 77, 88 (*Gutierrez*) ["Substantive unconscionability focuses on whether the provision is overly harsh or one-sided and is shown if the disputed provision of the contract falls outside the 'reasonable expectations' of the nondrafting party or is 'unduly oppressive.' [Citations.]"].)

**B. Procedural Unconscionability**

The court found here that the arbitration agreement was procedurally unconscionable. It concluded that the agreement was a contract of adhesion because it was prepared and presented by appellants who purported to befriend the 82-year-old Chamberlain but instead induced her to mortgage her home to pay for overcharged repairs. The court also found that surprise was present because the notation on the addenda contracts—"[a]ll other terms and conditions stated in the original contract to remain the same"—did not put Chamberlain on notice that the arbitration agreement extended to the addenda. We agree with both findings.

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[11] "'Our Supreme Court in *Perdue* [*v. Crocker National Bank* (1985) ] 38 Cal.3d 913 [] . . . performed its unconscionability analysis exclusively under the *Graham* approach, but noted the two analytical approaches are not incompatible, declaring: "Both pathways should lead to the same result." (*Id.* at p. 925, fn. 9.) Many years later in *Armendariz,* the court approved both approaches without expressing a preference for either one. (*Armendariz, supra,* 24 Cal.4th at pp. 113–114.) In the recent case of *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064 [] [(*Little*)] . . . , our high court employed exclusively the procedural/substantive approach derived from *A & M Produce.*" (*Parada, supra*, 176 Cal.App.4th at pp. 1568-1569.)

First, the arbitration agreement is a contract of adhesion. "An adhesion contract is a standardized contract written entirely by a party with superior bargaining power, leaving the weaker party in a 'take-it-or-leave-it' position. [Citations.] In the characteristic adhesion contract, the stronger party has drafted the contract and given the weaker party no opportunity to negotiate its terms and the weaker party may have no realistic opportunity to look elsewhere for a more favorable contract, but must adhere to the standardized agreement. [Citation.]" (*Cubic Corp. v. Marty* (1986) 185 Cal.App.3d 438, 449.) We are not persuaded by appellants' contrary argument that Chamberlain simply could have chosen not to do business with appellants, hired a different contractor, or ceased having work performed at any time. Finding this arbitration agreement to be a contract of adhesion is particularly appropriate under the present circumstances, in which appellants solicited Chamberlain in her home, befriended her over a one-month period, convinced her that she needed home improvement services, and then presented her with a form contract and arbitration agreement.

Second, the element of surprise is present because it is not clear that the arbitration agreement applies to the addenda. We do not agree with appellants' argument that Chamberlain should have expected the arbitration agreement to apply to the addenda because they modified the original home improvement contract. It is questionable whether the addenda are modifications of the original home improvement contract or whether they are stand-alone contracts. Only one of the addenda actually refers to the date of the home improvement contract. Additionally, all of the addenda contain the statement, "[c]ustomer further understands that the entire agreement is contained herein." This language suggests that the addenda are stand-alone agreements. On the other hand, the addenda state, "[a]ll other terms and conditions stated in original contract remain the same," which could suggest that the addenda are modifications of the original contract. Given the ambiguity of the language in the addenda, any attempt to apply the arbitration agreement to them creates surprise.

Finally, we find oppression in the language of the arbitration agreement itself. Chamberlain and the court interpreted the agreement as incorporating only the uniform

rules for binding arbitration of the BBB, while appellants contend that the agreement contains a choice of rules, including the AAA rules. We find that the two rules clauses are irreconcilably inconsistent and in fact do not provide Chamberlain with a choice. The agreement first states that arbitration is to be conducted under the construction industry arbitration rules of the AAA and then states it will be governed by the rules of the BBB in effect at the time of initiation of arbitration. The determination of which rules apply is further confounded by the agreement's failure to specify the applicable version of the AAA rules and by its designation of the BBB rules in effect at the time arbitration is initiated.

At the time of execution of the arbitration agreement, Chamberlain could not possibly have known what rules would actually apply to an arbitration, and even now she cannot know what rules would apply. Courts have found oppression under circumstances less confusing than these. (See, e.g., *Harper v. Ultimo* (2003) 113 Cal.App.4th 1402, 1406 [oppression found where arbitration agreement failed to specify what version of the BBB rules applied].)

Based on the adhesiveness of the agreement and the surprise and oppression present, we find a high degree of procedural unconscionability. Therefore, under the sliding scale approach, only a low level of substantive unconscionability is required to render the arbitration agreement unenforceable.

**C. Substantive Unconscionability**

The trial court found the arbitration agreement to be substantively unconscionable. "[W]e review the ruling of the trial court, not its rationale." (*Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 85.) Although the court's findings in support of its ruling were not supported by the record,[12] we agree, with one exception, with its ruling that the arbitration agreement is substantively unconscionable. We find that the arbitration

[12] Neither party presented either the BBB or the AAA arbitration rules to the court. Chamberlain did not present evidence indicating the cost of arbitration or her financial condition. Thus the court had no basis in the record to conclude that the BBB rules were unfair, that Chamberlain had forfeited all discovery rights under the BBB rules, or that the arbitration costs would impose a hardship.

agreement is enforceable as it applies to the initial $15,000 home improvement contract for Chamberlain's bathroom remodel. However, applying the arbitration agreement beyond the initial home improvement contract would be contrary to Chamberlain's "reasonable expectations" and thus substantively unconscionable. (See *Graham*, *supra*, 28 Cal.3d at p. 820.)

Chamberlain seeks rescission of the home improvement contract because she was unaware that substantial work would be performed on her house, including miscellaneous safety work, window replacement, a complete rewiring of her home, installation of a new panel box, installation of new smoke detectors, and mold removal. She also alleges that she was substantially and intentionally overcharged for the above work, as well as the work she did consent to, consisting of a water heater installation, kitchen remodel, and bathroom remodel. All of this work, except for the bathroom remodel, was governed by addenda that were not presented to Chamberlain at the time she purportedly signed the home improvement contract and arbitration agreement. As discussed above, it is uncertain, as a matter of contractual interpretation, whether the arbitration agreement applies to these addenda. We find that in light of the ambiguities in the addenda—which must be resolved against the drafter (Civ. Code, § 1654)—Chamberlain could not reasonably have expected that claims related to work covered by those addenda would be subject to the arbitration agreement. Further, Chamberlain could not reasonably have expected that the arbitration agreement would cover claims related to work she was unaware would be performed. Accordingly, we largely agree with the trial court's conclusion that the arbitration agreement is substantively unconscionable.

As noted above, Chamberlain's causes of action for financial elder abuse and fraud and deceit contain allegations regarding unauthorized and overcharged work unrelated to the bathroom remodel. To the extent that these causes of action contain allegations that arguably fall within the terms of the arbitration agreement, the arbitration agreement is unconscionable as to them for the same reasons.

In sum, we conclude that the arbitration agreement is procedurally and substantively unconscionable, and therefore unenforceable, with respect to all of

Chamberlin's arbitrable causes of action except the rescission of the $15,000 bathroom remodel. Chamberlain's rescission cause of action alleges that she was overcharged for the bathroom remodel and that claimed is governed by the June 19, 2012 home improvement contract. This contract was presented to Chamberlain along with the arbitration agreement. Nonetheless, during oral argument, Chamberlain, in response to questioning from the court, stated that she does not intend to proceed on the $15,000 bathroom remodel portion of her rescission cause of action. Thus, there is no reason for the court to consider whether it should order arbitration as to the bathroom remodel.[13]

**DISPOSITION**

The court's order is affirmed. Chamberlain is awarded her costs on appeal.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

COLLINS, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.

[13] At the close of oral argument, appellants questioned whether rescission is an appropriate remedy for Chamberlain's rescission cause of action. Appellants have completed all the remodeling work on Chamberlain's home, making it impossible to return the parties to their original positions. We express no view on this issue.