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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

STEPHEN NORTON, Plaintiff and Respondent, v. FORD OF SANTA MONICA et al., Defendants and Appellants.	B237273 (Los Angeles County Super. Ct. No. BC453480)

APPEAL from an order of the Superior Court of Los Angeles County, Rolf M. Treu, Judge. Affirmed.

Manning Leaver Bruder & Berberich, Robert D. Daniels and Crystal S. Yagoobian for Defendants and Appellants.

Rosner, Barry & Babbitt, Hallen D. Rosner, Christopher P. Barry and Angela J. Smith for Plaintiff and Respondent.

INTRODUCTION

Defendants Chase Auto Finance Corporation (Chase) and Ford of Santa Monica, Inc., dba Subaru of Santa Monica (SSM) appeal from an order denying their motion to compel arbitration pursuant to an arbitration agreement found in a vehicle purchase contract executed by plaintiff Stephen Norton. Because we find that provisions of the arbitration agreement were procedurally and substantively unconscionable, we affirm the order denying defendants' petition to compel arbitration.

FACTUAL AND PROCEDURAL HISTORY

On January 21, 2011, Norton filed a complaint against defendants SSM, Chase, and Chrysler Group, LLC (Chrysler).[1] after the trial court sustained a demurrer with leave to amend was sustained, Norton filed a first amended complaint on July 28, 2011.

The first amended complaint contained the following allegations. In May 2009, Norton saw SSM's advertisement for the sale of a used 2008 Dodge Avenger for $12,900. Norton went to SSM, test drove the vehicle, and told a salesman he was interested in buying the vehicle and wanted to trade in his 2003 Nissan Maxima. The salesman offered him $1,000 to trade in his Nissan Maxima.

Norton told the salesman he wanted monthly payments of $200 and he could make a $3,000 down payment. After the salesman left to speak to a superior, he returned with a document showing amounts for monthly payment, down payment, and other financial terms. Norton stated he wanted to look around more before purchasing a vehicle, and said $1,000 to trade in his Maxima was not enough. The salesman told Norton he would buy the Maxima himself for $1,500 because he knew someone who wanted one. The complaint alleged that the salesman falsely stated that SSM purchased the 2009 Dodge Avenger from its prior owner who could not afford to keep it, when in fact SSM had purchased the vehicle at an automobile auction a year earlier.

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[1] Norton filed a dismissal with prejudice as to all claims against Chrysler Group, LLC and that dismissal was entered on April 3, 2012.

Norton agreed to buy the vehicle, A finance manager offered Norton an extended warranty for $1,500 that would cover the vehicle up to 100,000 miles. Norton agreed to buy the extended warranty, which was actually a service contract from Ford. Norton did not know that a Chrysler 3-year/36,000 mile warranty still covered the vehicle, and that a power train warranty extended to 7 years/70,000 miles.

SSM's finance manager prepared documents for Norton's vehicle purchase, which included a Retail Installment Sale Contract (RISC), and instructed Norton where to sign and initial each document. The RISC contained an $8.75 charge for "California Tire Fees." None of the tires on the vehicle were new. The RISC also included $2,475 for an extended warranty that SSM had told Norton would cost approximately $1,500. The RISC included a $29 "Optional DMV Electronic Filing Fee," which SSM never discussed with Norton or informed him was an optional fee. Elsewhere SSM prepared a Pre-Contract Disclosure Statement that the "optional fee for seller to electronically register vehicle" was "N/A" or not applicable.

Not long after purchasing the vehicle, Norton experienced problems including a rough idle, repeated stalling while the vehicle was stopped or when accelerating from a stop, shaking or shuddering in the front end and steering wheel, rattling and/or squeaking windows, and a rubbing sound and vibration from the front of the vehicle.

During 2009 and 2010, Norton brought the vehicle to a Chrysler facility for repairs seven times. Defendants were unable to repair the vehicle.

The first amended complaint alleged nine causes of action against SSM: 1) a class claim for violation of the Consumers Legal Remedies Act (CLRA) (Civ. Code, § 1750 et seq.), alleging that SSM illegally charged customers California Tire Fees for used rather than new tires; 2) a class claim and an individual claim for violation of the Automobile Sales Finance Act, (AFSA) (Civ. Code, § 2981 et seq.), by charging Norton and class members California Tire Fees when none were owed, by providing Norton with a false optional products and services disclosure statement, and by violating the "single document rule" of Civil Code section 2981.9 insofar as the RISC did not show the correct amount due and owing for California tire Fees; 3) a class claim for violation of Business

& Professions Code section 17200 et seq. by charging California tire fees in sales of used vehicles with used, not new, tires; 4) a class claim for violation of Public Resources Code section 42885 by charging purchasers of used cars with used tires $1.75 per new tire in the sale of a motor vehicle; 5) a class claim for violation of the CLRA by selling motor vehicles to consumers and representing that the transactions had been supplied in accordance with previous representations when they had not, by representing that the transactions involved obligations which they did not involve or which were prohibited by law, and by inserting unconscionable provisions in purchase contracts; 6) a class claim for violation of Business & Professions Code section 17200 et seq. by charging customers an optional DMV electronic filing fee without telling them they could refuse to pay this optional fee; 7) an individual claim for violation of the CLRA by misrepresenting the characteristics and quality of the vehicle sold to Norton, advertising goods with intent not to sell them as advertised, misrepresenting that the transaction conferred or involved rights, remedies, or obligations, and inserting unconscionable provisions in purchase contracts; 8) an individual claim for violation of Business and Professions Code section 17200 et seq. against SSM and Chase by inserting an unconscionable arbitration clause on the back of the RISC; violating the AFSA; misrepresenting after market products and services, extended warranties, and factory warranties; misrepresenting the title or ownership history of vehicles; providing customers with false pre-contract disclosure statements; and failing to affix a buyer's guide to used vehicles for sale on SSM's lot; 9) an individual claim for violation of the Song-Beverly Consumer Warranty Act (Civ. Code, §1790 et seq.) for delivering a vehicle with serious defects and non-conformities to warranty, failing to conform the vehicle to applicable warranties, and refusing Norton's demands for a refund or replacement.

On August 17, 2011, SSM filed a petition for orders compelling binding contractual arbitration of claims. The petition quoted the arbitration clause in the RISC executed by plaintiff Norton:

"**ARBITRATION CLAUSE**

"PLEASE REVIEW – IMPORTANT – AFFECTS YOUR LEGAL RIGHTS

"1. EITHER YOU OR WE MAY CHOOSE TO HAVE ANY DISPUTE BETWEEN US DECIDED BY ARBITRATION AND NOT IN COURT OR BY JURY TRIAL.

"2. IF A DISPUTE IS ARBITRATED, YOU WILL GIVE UP YOUR RIGHT TO PARTICIPATE AS A CLASS REPRESENTATIVE OR CLASS MEMBER ON ANY CLASS CLAIM YOU MAY HAVE AGAINST US INCLUDING ANY RIGHT TO CLASS ARBITRATION OR ANY CONSOLIDATION OF INDIVIDUAL ARBITRATIONS.

"3. DISCOVERY AND RIGHTS TO APPEAL IN ARBITRATION ARE GENERALLY MORE LIMITED THAN IN A LAWSUIT, AND OTHER RIGHTS THAT YOU AND WE WOULD HAVE IN COURT MAY NOT BE AVAILABLE IN ARBITRATION.

"Any claim or dispute, whether in contract, tort, statute or otherwise (including the interpretation and scope of this Arbitration Clause, and the arbitrability of the claim or dispute), between you and us or our employees, agents, successors or assigns, which arises out of or relates to your credit application, purchase or condition of this vehicle, this contract or any resulting transaction or relationship (including any such relationship with third parties who do not sign this contract) shall, at your or our election, be resolved by neutral, binding arbitration and not by a court action. If federal law provides that a claim or dispute is not subject to binding arbitration, this Arbitration Clause shall not apply to such claim or dispute. Any claim or dispute is to be arbitrated by a single arbitrator on an individual basis and not as a class action. You expressly waive any right you may have to arbitrate a class action. You may choose one of the following arbitration organizations and its applicable rules: the National Arbitration Forum, Box 50191, Minneapolis, MN 55405-0191 (www.arb-forum.com), the American Arbitration Association, 335 Madison Ave., Floor 10, New York, NY 10017-4605 (www.adr.org), or any other organization that you may choose subject to our approval. You may get a

copy of the rules of these organizations by contacting the arbitration organization or visiting its website.

"Arbitrators shall be attorneys or retired judges and shall be selected pursuant to the applicable rules. The arbitrator shall apply governing substantive law in making an award. The arbitration hearing shall be conducted in the federal district in which you reside unless the Creditor-Seller is a party to the claim or dispute, in which case the hearing will be held in the federal district where this contract was executed. We will advance your filing, administration, service or case management fee and your arbitrator or hearing fee all up to a maximum of $2500, which may be reimbursed by decision of the arbitrator at the arbitrator's discretion. Each party shall be responsible for its own attorney, expert and other fees, unless awarded by the arbitrator under applicable law. If the chosen arbitration organization's rules conflict with this Arbitration Clause, then the provisions of this Arbitration Clause shall control. The arbitrator's award shall be final and binding on all parties, except that in the event the arbitrator's award for a party is $0 or against a party is in excess of $100,000, or includes an award of injunctive relief against a party, that party may request a new arbitration under the rules of the arbitration organization by a three-arbitrator panel. The appealing party requesting new arbitration shall be responsible for the filing fee and other arbitration costs subject to a final determination by the arbitrators of a fair apportionment of costs. Any arbitration under this Arbitration Clause shall be governed by the Federal Arbitration Act (9 U.S.C. § 1 et seq.) and not by any state law concerning arbitration.

"You and we retain any rights to self-help remedies, such a repossession. You and we retain the right to seek remedies in small claims court for disputes or claims within that court's jurisdiction, unless such action is transferred, removed or appealed to a different court. Neither you nor we waive the right to arbitrate by using self-help remedies or filing suit. Any court having jurisdiction may enter judgment on the arbitrator's award. This Arbitration Clause shall survive any termination, payoff or transfer of this contract. If any part of this Arbitration Clause, other than waivers of class action rights, is deemed or found to be unenforceable for any reason, the remainder shall

remain enforceable. If a waiver of class action rights is deemed or found to be unenforceable for any reason in a case in which class action allegations have been made, the remainder of this Arbitration Clause shall be unenforceable."

Norton signed a box on the first page of the contract stating: "You agree to the terms of this contract. You confirm that before you signed this contract, we gave it to you, and you were free to take it and review it. You acknowledge that you have read both sides of this contract, including the arbitration clause on the reverse side, before signing below. You confirm that you received a completely filled-in copy when you signed it."

On September 14, 2011, the trial court denied the petition to compel arbitration. The trial court determined that pursuant to *AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 1740, the Federal Arbitration Act (9 U.S.C. § et seq.) preempted the prohibition of class action waivers in the CLRA and applied to the Norton-SSM RISC. The trial court applied California law and determined that the arbitration clause was procedurally and substantively unconscionable. The trial court found that by excepting cases that the dealership would likely bring, including repossession and small claims cases, the arbitration clause made only the weaker party's likely claims arbitrable and was thus substantively unconscionable. Moreover, requiring defendants to advance up to $2500 of initial arbitration fees while potentially requiring plaintiff to reimburse those fees was unconscionable under Code of Civil Procedure section 1284.3, subdivision (a). The trial court denied the petition to compel arbitration.

Defendants filed a timely notice of appeal on November 10, 2011.[2]

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[2] An order denying a petition to compel arbitration is an appealable order. (Code Civ. Proc., § 1294, subd. (a); *Birl v. Heritage Care, LLC* (2009) 172 Cal.App.4th 1313, 1318.)

ISSUE

Defendants claim on appeal that the order denying defendant's motion to compel arbitration because the arbitration clause was unconscionable requires reversal because that arbitration clause was not procedurally or substantively unconscionable.

DISCUSSION

1. *Standard of Review*

Where a court's order denying a petition to compel arbitration is based on a decision of fact, this court adopts a substantial evidence standard of review. If the order denying a petition to compel arbitration is based solely on a decision of law, this court employs a de novo standard of review. (*Laswell v. AG Seal Beach, LLC* (2010) 189 Cal.App.4th 1399, 1406.)

2. *Unconscionability Analysis of Provisions of the Arbitration Agreement*

Plaintiff claims that the order denying defendants' petition to compel arbitration should be affirmed because provisions of the arbitration agreement are unconscionable. We agree.

A. *Arbitration: The Law of Unconscionability*

Arbitration agreements rely on the parties' voluntary submission of disputes for resolution in a non-judicial forum. (*Armendariz v. Foundation Health Psychcare Services, Inc*. (2000) 24 Cal.4th 83, 115 (*Armendariz*); *Fitz v. NCR Corp*. (2004) 118 Cal.App.4th 702, 711) "A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract." (Code Civ. Proc., § 1281; see also *id*., § 1281.2, subd. (b).) Unconscionability provides one such ground for invalidating arbitration agreements. (Civ. Code, § 1670.5, subd. (a); *Armendariz*, at pp. 113-114.)

The doctrine of unconscionability has both a procedural and a substantive element. The procedural element focuses on "oppression" or "surprise" due to the parties' unequal bargaining power. The substantive element focuses on "overly harsh" or "one-sided" results. (*Little v. Auto Stiegler, Inc*. (2003) 29 Cal.4th 1064, 1071 (*Little*).)

The procedural element of unconscionability generally takes the form of a contract of adhesion (*Little, supra*, 29 Cal.4th at p. 1071). A 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.]" (*Ibid*.) Such a contract is procedurally unconscionable because the "inequality of bargaining power of the parties to the contract" creates "an absence of real negotiation or a meaningful choice on the part of the weaker party." (*Kinney v. United HealthCare Services, Inc*. (1999) 70 Cal.App.4th 1322, 1329.)

Substantive unconscionability focuses on whether the terms of the agreement are so one-sided as to "shock the conscience." Mutuality is the paramount consideration in assessing substantive conscionability. Substantive unconscionability can take various forms but can generally be described as unfairly one-sided. (*Nyulassy v. Lockheed Martin Corp*. (2004) 120 Cal.App.4th 1267, 1281; see *Abramson v. Juniper Networks, Inc*. (2004) 115 Cal.App.4th 638, 656-658.)

For a court to exercise its discretion to refuse to enforce an arbitration clause because of its unconscionability, both procedural and substantive unconscionability must be present. Both need not be present in the same degree, however, and a "sliding scale" test applies to their relative importance. Pursuant to this sliding scale test, "the 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." (*Armendariz, supra*, 29 Cal.4th at p. 114.)

The party seeking to compel arbitration bears the burden of proving the existence of a valid arbitration agreement. (*Fagelbaum & Heller LLP v. Smylie* (2009) 174 Cal.App.4th 1351, 1363.)

Whether a contract is unconscionable is a question of law, and where there are no factual disputes the appellate court reviews the issue of unconscionability de novo. (*Lanigan v. City of Los Angeles* (2011) 199 Cal.App.4th 1020, 1035.)

B. *The Arbitration Clause Was Procedurally Unconscionable Because It Contains Elements of Surprise*

The analysis of procedural unconscionability concerns the manner in which the contract was negotiated and the parties' circumstances at that time. (*Gatton v. T-Mobile USA, Inc*. (2007) 152 Cal.App.4th 571, 581.) Procedural unconscionability arises from oppression and surprise. Oppression arises in circumstances where the parties have unequal bargaining power that results in no real negotiation and the weaker party's absence of meaningful choice. Surprise arises from terms of the bargain being hidden in a prolix form drafted by the party occupying a superior bargaining position. (*Olsen v. Breeze, Inc*. (1996) 48 Cal.App.4th 608, 621.)

The vehicle purchase contract contains elements of surprise. Placement of the arbitration agreement was inconspicuous, on the reverse of the page that Norton signed. Although he was required to sign the first page of the vehicle purchase contract seven times, he was not required to sign or initial the arbitration clause on the reverse side. There was actual surprise because of SSM's failure to call the arbitration clause to the attention of its customer. (*A & M Produce Co. v. FMC Corp.* (1980) 135 Cal.App.3d 473, 490.) Under these circumstances, the arbitration clause was procedurally unconscionable. (*Ibid*.; *Gutierrez v. Autowest, Inc*. (2003) 114 Cal.App.4th 77, 89 (*Gutierrez)*.)

Because the vehicle purchase contract contained an elements of surprise, the contract was procedurally unconscionable.

C. *The Arbitration Clause Was Substantively Unconscionable*

i. *Substantive Unconscionability*

Substantive unconscionability make take several forms, but is generally described as a contractual term that is unfairly one-sided (*Little, supra*, 29 Cal.4th at p. 1071) so as to shock the conscience or as imposing harsh or oppressive terms. (*Wherry v. Award, Inc*. (2011) 192 Cal.App.4th 1242, 1248.) "Substantive unconscionability pertains to the fairness of an agreement's actual terms and to assessments of whether they are overly harsh or one-sided." (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development*

(US), LLC (2012) 55 Cal.4th 223, 246.) Unconscionability may occur when an agreement lacks a "modicum of bilaterality," as when one party's claims are subject to arbitration but the other party's claims are excluded or exempted from the arbitration requirement. (*Little,* at pp. 1071-1072.) Another kind of substantive unconscionability may occur when the party imposing arbitration requires a post-arbitration proceeding which is wholly or largely to its benefit at the expense of the party on which the arbitration is imposed. (*Id*. at p. 1072.) These forms of substantive unconscionability are present in the arbitration clause at issue in this appeal.

ii. *The Provision for a New Arbitration in Some Circumstances Is Substantively Unconscionable Because It Primarily Benefits the Automobile Dealer and Because of Its Allocation of Responsibility for the Filing Fee and Other Arbitration Costs*

Norton claims that the following provision is substantively unconscionable: "The arbitrator's award shall be final and binding on all parties, except that in the event the arbitrator's award for a party is $0 or against a party is in excess of $100,000, or includes an award of injunctive relief against a party, that party may request a new arbitration under the rules of the arbitration organization by a three-arbitrator panel. The appealing party requesting new arbitration shall be responsible for the filing fee and other arbitration costs subject to a final determination by the arbitrators of a fair apportionment of costs."

Although superficially bilateral insofar as in some circumstance, each party is provided a method for requesting a new arbitration after an arbitrator's award, this provision of the arbitration agreement has the effect of benefiting the party with superior bargaining power, the automobile dealer. A car buyer does not benefit from a provision allowing the dealership to seek a new arbitration of an award of more than $100,000 because the buyer, not the dealer, will be the party more likely to recover an award of that size. If the buyer obtains an award under the $100,000 threshold but believes it is too low, the buyer has no option to request a new arbitration unless the award is $0.

Therefore in practical terms, this provision makes a new arbitration available only to the dealer.

Additionally, this arbitration provision requiring the party requesting a new arbitration to advance filing fees and arbitration costs is unconscionable because it allows a financially strong automobile dealership to request a new arbitration while discouraging or preventing a cash-strapped consumer from doing so.

In the trial court, Norton's declaration stated that arbitrators typically charged hundreds of dollars per hour, and that if SSM lost it could request a new arbitration with a three-arbitrator panel and that Norton could be responsible for all the costs of those three arbitrators if he did not win that new arbitration. Norton stated that he was not financially able to pay such potential arbitration fees. This was sufficient evidence of the amount of filing fees and other costs for a new three-arbitrator arbitration, and that this amount would exceed plaintiff's ability to pay. (*Gutierrez, supra,* 114 Cal.App.4th at p. 90.)

Gutierrez holds that it is substantively unconscionable to require a consumer to give up the right to utilize the judicial system while imposing prohibitively high arbitral forum fees. (*Gutierrez, supra,* 114 Cal.App.4th at p. 90.) *Gutierrez* also found that despite the potential for imposition of a substantial administrative fee on plaintiff, the arbitration agreement had no effective procedure for a consumer to obtain a fee waiver or reduction. *Gutierrez* found that the arbitration agreement must provide some effective avenue of relief from unaffordable fees and that the arbitration agreement before it did not do so. (*Id*. at pp. 91-92.) The absence of any procedure for a consumer to obtain a fee waiver or reduction or of some effective avenue of relief from unaffordable fees makes the arbitration agreement in the SSM-Norton vehicle purchase contract substantively unconscionable.

DISPOSITION

The order denying the petition to compel arbitration is affirmed. Costs on appeal are awarded to plaintiff Stephen Norton.

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KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.