

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF RICHLAND)	FIFTH JUDICIAL CIRCUIT
)	
THOMAS AND STACY LANHAM)	Case No. 2021CP4000206
)	
)	
PLAINTIFFS,)	
)	
vs.)	
)	
RUMSEY CONSTRUCTION & RENOVATION, LLC DBA RUMSEY CONSTRUCTION & RESTORATION)	
)	
DEFENDANT)	
_____)	

ORDER

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Jan 10 2022

SC Court of Appeals

This matter was before this Court on October 27, 2021, for a hearing on Defendant’s Motion to Compel Arbitration. The Court heard oral arguments from opposing counsel and has reviewed all briefs and materials submitted by each party.

Factual and Procedural Background

This matter involves a dispute arising from remediation work performed by the Defendant at Plaintiff’s residence. In the late evening hours of January 15, 2018, Plaintiff’s residence suffered substantial property damage as a result of a sewer black water category 3 (sewage) loss to the interior of their home. Plaintiffs notified their insurance carrier, and the insurance carrier called Rumsey Construction & Renovation (“Defendant”) to remediate the damage. On January 17, 2018, a representative from Defendant showed up to Plaintiff’s home at 228 Rosebank Dr. Columbia, SC 29209-1928 (“Property”). The representative told Plaintiff that the emergency repairs couldn’t be completed until she signed the agreement at issue. Plaintiff filed a lawsuit for improper remediation work, and Defendant in turn filed its Motion to Compel Arbitration.

Legal Analysis

Plaintiff contends that the arbitration agreement should not be enforced because 1) it fails to provide proper notice pursuant to the provisions of S.C. Code section §15-48-10(a); 2) it is unconscionable by its terms; and 3) the agreement was only signed by one of the Plaintiffs, Stacy Lanham, leaving the potential for two actions to proceed in different forums.

I. The South Carolina Notice Requirement

In order to comply with South Carolina Code section 15-48-10(a), an arbitration provision must notify the person signing the contract that the “contract is subject to arbitration pursuant to this chapter and shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract and unless such notice is displayed thereon the contract shall not be subject to arbitration.”

In reviewing the subject contract, it appears that Defendant sufficiently complied with the requirements, as the arbitration notice is underlined, in capital letters, and on the first page of the contract. *See Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 588, 553 S.E.2d 110, 114 (2001). *Soil Remediation Co. v. Nu-Way Environmental, Inc.*, 323 S.C. 454, 458, 476 S.E.2d 149, 151 (1996).

II. Duress and Unconscionability

Plaintiff next alleges that the agreement should be invalidated based upon arguments of duress and unconscionability. General contract principles of law apply in a court's evaluation of the enforceability of an arbitration clause. *Simpson v. Msa of Myrtle Beach, Inc.*, 644 S.E.2d 663, 373 S.C. 14 (2007). Therefore, a party may seek the revocation of the contract under such grounds as exist at law or in equity, including fraud, duress, and unconscionability. *Simpson v.*

Msa of Myrtle Beach, Inc., 644 S.E.2d 663, 373 S.C. 14 (2007) (citing S.C. Code Ann. § 15-48-10(a)).

a. Duress

In the present case, as stated in her affidavit, at the time of the signing of the document, Plaintiff Stacey Lanham was in her home, which was “covered in black water.” She stated that she was under extreme stress and duress at the time, and it is understandable that someone would be under stress and duress if sewage was spewing throughout their home. As such, the Court finds that the underlying circumstances of the signing of the agreement amount to duress, and it denies Defendant’s Motion to Compel Arbitration based upon the duress of the Plaintiff.

b. Unconscionability

“In South Carolina, unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them.” *Simpson v. Msa of Myrtle Beach, Inc.*, 644 S.E.2d 663, 373 S.C. 14 (2007).

In order to invalidate the agreement, there must be a showing of an absence of meaningful choice on the part of one party which speaks to the fundamental fairness of the bargaining process. In determining whether a contract lacked meaningful choice, “courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause.” *Simpson v. Msa of Myrtle Beach, Inc.*, 644 S.E.2d 663, 373 S.C. 14 (2007).

The court acknowledges that Plaintiff indicated that she failed to read the agreement because of the situation; however, this does not provide her a basis for relief. *See Munoz v. Green Tree Financial Corp.*, 542 S.E.2d 360, 343 S.C. 531 (2001).

Plaintiff challenges the unfair term of the allowance of the filing of a mechanic's lien by the Defendant while prohibiting the Plaintiff from filing in circuit court; however, this argument fails, as South Carolina Code section 15-48-220 states that an arbitration clause has no effect on filing and perfecting a mechanics lien. Further, a lack of mutuality of remedy does not per se invalidate an agreement. *See Munoz v. Green Tree Financial Corp.*, 542 S.E.2d 360, 343 S.C. 531 (2001).

In considering the lack of meaningful choice is in the present case, the court considered the following factors: (1) no evidence that Plaintiff had a substantial business concern; (2) relative disparity in the bargaining power between the parties; (3) no evidence of Plaintiff's business sophistication in contracts; (4) that this contract is an adhesion contract (while it does not make it per se unconscionable, it can be a factor in the analysis); and (5) that the contract was "hastily" presented for signing which was suggested by Plaintiff's affidavit which says they "demanded that I sign papers before they would remediate...." *See generally Simpson v. Msa of Myrtle Beach, Inc.*, 644 S.E.2d 663, 373 S.C. 14 (2007).

For these reasons, the court denies the Defendant's Motion to Compel Arbitration due to the unconscionability of the agreement.

III. Joinder of a Nonsignatory to Arbitration

While there is a presumption in favor of arbitration agreements, this presumption only applies where a valid arbitration agreement exists between the parties. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110 (2001). Arbitration is a matter of contract, and a

party cannot be forced to waive his constitutional right to a jury and arbitrate a claim where he has not agreed to do so. *Weaver v. Brookdale Senior Living, Inc.*, 431 S.C. 223, 847 S.E.2d 268 (Ct. App. 2020).

State law controls when an arbitration agreement may be enforced against someone who has not signed it. *Id.* at 231; *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630–31 (2009). South Carolina law recognizes several theories whereby a nonsignatory can be bound by an arbitration agreement. *Malloy v. Thompson*, 409 S.C. 557, 561–62, 762 S.E.2d 690, 692 (2014) (listing theories as incorporation by reference, assumption, agency, veil piercing/alter ego, and estoppel).

South Carolina Code section 15-48-60 would presumably authorize Plaintiff Thomas Lanham being joined in the arbitration proceeding; however, South Carolina Code section 15-48-10(b)(4) indicates that an arbitration arising from this chapter does not apply to any claim for personal injury based on contract or tort. Plaintiff's counsel argued at the hearing that there is a claim for personal injury damages by the husband, Thomas Lanham. Therefore, it would not make sense to try the personal injury claim in court and the remaining claims in arbitration. Plaintiff Thomas Lanham did not sign the contract and should not be held bound to the contract. In reviewing the materials and arguments of counsel, there is no evidence of agency here, and there is no presumption of agency between husband and wife.

For this reason, the court denies Defendant's Motion to Compel Arbitration.

IT IS SO ORDERED

The Honorable Donald B. Hocker



Richland Common Pleas

Case Caption: Thomas Lanham , plaintiff, et al vs Rumsey Construction & Renovation Llc , defendant, et al

Case Number: 2021CP4000206

Type: Order/Alternative Dispute Resolution

Circuit Court Judge

s/Donald B. Hocker, Judge Code 2167