IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

LORAYNE AND GENE BARGMAN,

Plaintiffs/Appellees,

vs.

No. 31,088
(D. Ct. No. CV 2010 8447)

SKILLED HEALTHCARE GROUP, INC.,
SKILLED HEALTHCARE, L.L.C.,
CANYON TRANSITIONAL REHABILITATION
CENTER, L.L.C. and
ANMARIE DVORAK, ADMINISTRATOR,

Defendants/Appellants.

Appeal from the Second Judicial District Court,
Bernalillo County, New Mexico
The Honorable Valerie A. Huling, Judge

REPLY BRIEF

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Certificate of Compliance

The body of the attached brief exceeds the fifteen-page limit set forth in Rule 12-213(F)(2) NMRA. As required by Rule 12-213(G) NMRA, we certify that this brief complies with Rule 12-213(F)(3) NMRA, in that the brief is proportionately-spaced and the body of the brief contains 3,917 words. The brief was prepared and the word count determined using Microsoft Office Word 2003 (11.8328.8341) SP3.

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Introduction

Focusing upon the fundamental principles of unconscionability analysis is the key to resolving this case. Canyon Transitional therefore does not respond to the Bargmans' negligence and injury allegations (e.g., Answer Br. at 1, 2).[1] In working through the remaining issues raised by the Bargmans, one can lose sight of where the focus belongs. In the end, the understanding which emerges is that the touchstones for substantive and procedural unconscionability are not met on the record in this case.

Arguments

1. The scope of this appeal is limited to the enforceability of the Arbitration Agreement.

In their first argument point (Answer Br. at 6-8), the Bargmans raise various considerations. At the outset, one of them warrants clarification. Unlike what statements by the Bargmans may suggest – (e.g., id. at 8 ("It is Defendants' burden to establish that the elements of a valid arbitration contract existed.")) – the existence of an arbitration agreement is not an issue in this appeal. Below, after Canyon Transitional moved to compel arbitration based upon the Arbitration Agreement signed by LoRayne Bargman (R.P. 58-67), in arguing that the elements for a contract were not met, the Bargmans argued only that the element of

[1] For simplicity's sake, unless otherwise indicated, "Canyon Transitional" includes Skilled Healthcare Group, Inc., Skilled Healthcare, L.L.C., Canyon Transitional Rehabilitation Center, L.L.C., and Administrator AnMarie Dvorak.

consideration, see UJI 13-801 NMRA, was lacking. (R.P. 91-93; 11/22/10 Tr. at 17-22); see also R.P. 116-17; 11/22/10 Tr. at 3-5 (Canyon Transitional's replies).) The district court ruled against them on that issue. (11/22/10 Tr. at 27-28.) Because they have not attempted to persuade this Court to rule differently (see generally Answer Br.), they have abandoned the issue on appeal. City of Santa Fe v. Komis, 114 N.M. 659, 665, 845 P.2d 753, 759 (1992).

2. Substantive unconscionability does not provide a basis for not enforcing the Arbitration Agreement.

The gist of the Bargmans's substantive unconscionability arguments is that the district court took the correct analytical approach. (Answer Br. at 8-29.) Where appropriate, Canyon Transitional clarifies why the considerations upon which the Bargmans rely do not support that conclusion.

The parties do not necessarily disagree about the standards that apply. They agree on the types of issues that courts focus on in analyzing whether terms in an arbitration agreement are substantively unconscionable. (Br. in Chief at 15; Answer Br. 9.) They also agree that if a court relies on substantive unconscionability alone, the terms must be egregiously one-sided (Br. in Chief at 19; Answer Br. at 9) and must contravene public policy (Br. in Chief at 19-20; Answer Br. at 11).

What the parties disagree about is how the standards should be applied to the record in this case. Condensed, Canyon Transitional's position is that precedent,

including Cordova v. World Finance Corporation, 2009-NMSC-021, 146 N.M. 256, 208 P.3d 901 and Rivera v. American General Financial Services, Inc., 2011-NMSC-033, 150 N.M. 398, 259 P.3d 803, teaches that when substantive unconscionability is alleged, each arbitration agreement must be analyzed individually, taking into account all of the relevant circumstances and considerations (Br. in Chief at 14-22, 28-29) and that the district court disregarded the teachings (id. at 12-15).

The Bargmans' position is that if an arbitration agreement contains an arbitration exclusion that looks one-sided, a court does not have to consider anything else before declaring the agreement substantively unconscionable, as did the district court. (See, e.g., Answer Br. at 11 ("[T]he Cordova Court clarified that a particular type of clause could be substantively unconscionable enough as to render the entire arbitration contract void . . . . : a clause which was so one-sided in its description of what disputes would be arbitrated."); id. at 17 ("[O]nce this type of clause is found to exist, no further examination of the remaining terms of the arbitration clause is necessary or proper."); id. at 18 ("As the district court did, substituting 'nursing home' and 'resident' for 'lender' and 'borrower' mandates the exact same conclusion reached in Rivera and Cordova.").)

The parties' positions thus present the following question. Has New Mexico law evolved to the point that upon seeing an arbitration exclusion, a court

automatically may presume that the exclusion is one-sided, making the agreement substantively unconscionable?

Rather than engaging in a principled dialog on the issue, the Bargmans manufacture issues that divert attention from the considerations that matter for purposes of resolving the issue and how this case should proceed moving forward. That strategy begins on page 10 of the Bargmans' brief. There, for example, they incorrectly suggest (without any citations, cf. Rule 12-213(A)(4), (B) NMRA) that Canyon Transitional is raising new considerations on appeal. The record shows that Canyon Transitional raised similar considerations below. (R.P. 71-74, 121-22; 11/22/10 Tr. at 10-15.)

Unlike what the Bargmans next assert on page 10 (again with no citation), Canyon Transitional does not contend that Cordova was an aberration but rather that the district court disregarded the longstanding standards that Cordova left in place and augmented for courts to apply when analyzing alleged substantive unconscionability. (Cf. Br. in Chief at 14-20.) That said, Canyon Transitional does not dispute that Cordova establishes (and Rivera reiterates) that terms in an arbitration agreement which expressly and exclusively reserve one party's right to go to court are substantively unconscionable. (Br. in Chief at 18-21.)

On pages 11 to 12 of their brief (again without citation), the Bargmans take another statement made by Canyon Transitional out of context and ignore the

related points. The points show that Canyon Transitional forthrightly acknowledged that precedent cited in Cordova reflects that impermissible one-sidedness also may arise from how the terms are likely to operate in practice. (Br. in Chief at 17-18.) What the Bargmans continue to side-step (Answer Br. at 12) is that unlike in Cordova, 2009-NMSC-021, ¶¶ 3-4, and Rivera, 2011-NMSC-033, ¶ 3, the terms of the Arbitration Agreement are not expressly one-sided (Brief in Chief at 3-4), meaning that those cases do not dictate the outcome in this case.

In continuing their argument (Answer Br. at 12), the Bargmans further mischaracterize Canyon Transitional's arguments. The Bargmans cite nothing showing that Canyon Transitional argued that in Rivera and Cordova the Supreme Court balanced the one-sided terms with other terms; the opinions do not reflect whether the issue arose in either case. Cf. Sangre de Cristo Dev. Corp. v. City of Santa Fe, 84 N.M. 343, 348, 503 P.2d 323, 328 (1972) ("The general rule is that cases are not authority for propositions not considered."). Because the terms in both cases expressly favored only one party's interests, the Supreme Court may have found the analysis clear-cut. What actually matters is that the Supreme Court did not articulate the rule adopted by the district court: that for all cases the presence of an arbitration exclusion automatically implicates substantive unconscionability. (See Br. in Chief at 12-13.) The district court therefore should

have applied the analytical standards that still exist under Cordova and Rivera. (See id. at 14-22, 28-29.)

In faulting Canyon Transitional for arguing that this Court should examine the Arbitration Agreement as a whole and in context (id. at 23-28), the Bargmans argue that "such an analysis is both unnecessary and improper." (Answer Br. at 16.) They cite no authority to that effect. (Id.) This Court may assume that none exists. In re Adoption of Doe, 100 N.M. 764, 765, 676 P.2d 1329, 1330 (1984).

Authority which does exist refutes the Bargmans' argument. E.g., Restatement (Second) of Contracts § 208 cmt. f, at 111 (1979) ("A determination that a contract or term is unconscionable is made by the court in light of all of the material facts."); Smith v. Price's Creameries, 98 N.M. 541, 545, 650 P.2d 825, 829 (1982) (viewing agreement as a whole); see also State ex rel. State Highway & Transp. Dep't v. Garley, 111 N.M. 383, 389-91, 806 P.2d 32, 38-40 (1991) (indicating that substantive unconscionability determination requires an evidentiary basis); see, e.g., Monette v. Tinsley, 1999-NMCA-040, 126 N.M. 748, 975 P.2d 361; Guthmann v. La Vida Llena, 103 N.M. 506, 511-513, 709 P.2d 675, 680-82 (1985), overruled on other grounds by Cordova v. World Fin. Corp., 2009-NMSC-021, 146 N.M. 256, 208 P.3d 901. It is difficult to imagine how else a court could make an adequately informed, properly supported decision on whether an arbitration agreement unreasonably and unfairly favors one party's interests.

In their next point (Answer Br. at 16-17), the Bargmans again take out of context a point made by Canyon Transitional and convert it to their own ends. In arguing that the Arbitration Agreement fairly and reasonably protects the interests of both parties, Canyon Transitional did not merely argue that is so because Canyon Transitional covers the arbitrators' fees. (Cf. Br. in Chief at 23-28.) In digressing upon the hypothetical point that they seek to make (Answer Br. at 17), the Bargmans again read into Rivera a proposition which, this time, they acknowledge the Supreme Court did not consider. Rivera, then, cannot be said to establish that the district court did not have to look beyond the allegedly one-sided exclusion. Supra p. 5 (Sangre de Cristo Dev.).

In arguing that the circumstances in this case support the district court's ruling (Answer Br. at 18-22), the Bargmans take new liberties. Initially (id. at 18), the Bargmans disregard the express terms of the Arbitration Agreement by portraying them as ones that require a resident to arbitrate all claims the resident has against Canyon Transitional notwithstanding the expressly bilateral terms of the discharge and collections exclusions. (Cf. Br. in Chief at 3-4.)

The Bargmans disregard far more. In arguing that the collections exclusion makes the Arbitration Agreement one-sided because that is the type of claim Canyon Transitional is most likely to pursue against a resident (Answer Br. at 19-21), they disregard the fact that they are relying upon arguments they did not make

below. (Cf. R.P. 97-98; 11/22/10 Tr. 17-22.) That is impermissible. Durham v. Guest, 2009-NMSC-007, ¶ 10, 145 N.M. 694, 204 P.3d 19. The differences matter because the arguments invite the Court to make factual inferences which lack underlying evidentiary support. Fitzsimmons v. Fitzsimmons, 104 N.M. 420, 427, 722 P.2d 671, 678 (Ct. App. 1986) ("[C]ounsel's beliefs and statements cannot be considered as evidence."). To fix that problem, the Bargmans cite cases involving a predecessor entity. (Answer Br. at 21.) In addition to the party distinction, the Bargmans disregard the fact that they did not cite the cases below. (Cf. R.P. 97-98; 11/22/10 Tr. at 17-22.) That, too, is impermissible. In re Mokiligon, 2005-NMCA-021, ¶ 7, 137 N.M. 22, 106 P.3d 584 (filed 2004).

Because the Bargmans' arguments invite Canyon Transitional to do so (Answer Br. at 21), Canyon Transitional revisits examples it raised below which reflect that the Arbitration Agreement is bilateral. The terms foreclose Canyon Transitional from litigating claims against a resident involving property damage and injuries to staff and visitors. (R.P. 121.) The terms also foreclose Canyon Transitional from litigating claims brought against it when the facts would likely result in a defense verdict in court rather than an arbitral award. (11/22/10 Tr. at 14-15.) Conversely, the collections exclusion enables a resident to sue Canyon Transitional for any overcharge. (R.P. 121.)

Unlike what the Bargmans further assert (Answer Br. at 21-22) the standard that they cite from Rivera and Cordova does not control the analysis because the record in this case does not establish that the exclusions are clearly one-sided. On a related note, in the district court Canyon Transitional did not treat the discharge exclusion as surplusage (id. at 22); Canyon Transitional pointed out that the exclusion protects a resident's due process right to a hearing (cf. R.P. 121).

The unpublished opinion in McGregor v. Christian Care Center of Springfield, L.L.C., No. M2009-01008-COA-R3-CV, 2010 WL 1730131 (Tenn. Ct. App. April 29, 2010) – which the Bargmans initially cite on page 23 of their brief – does not meaningfully inform the analysis. The arbitration agreement included an exception for "any legal controversy, dispute, disagreement or claim of any kind between Resident and facility solely regarding nonpayment by Resident for payments due to Facility." Id. at *6 (internal quotation marks & citation omitted). The plaintiff argued that the exclusion for claims involving nonpayment by the resident "unfairly [gave] the nursing home access to a [judicial] forum from which she [was] excluded." Id. The defendant argued that the court should follow Philpot v. Tennessee Health Management, Inc., 279 S.W.3d 573 (Tenn. Ct. App. 2007), in which the court concluded that the record did not contain a basis upon which to infer that the bilaterally-worded agreement before it was one-sided. McGregor, 2010 WL 1730131, at *7.

In McGregor, the court elected instead to follow Taylor v. Butler, 142 S.W.3d 277 (Tenn. 2004), a case which involved an expressly one-sided exception like those in Cordova and Rivera and, in so doing, concluded that the nursing home was the sole beneficiary of the exception and that the exception was unconscionable because it limited "the obligations of the stronger party." McGregor, 2010 WL 1730131, at *6-*7. The court did not explain what in the record before it – as compared to that in Philpot – supported these inferences. In addressing its own unpublished opinions, this Court has acknowledged that such opinions may not provide dispositive details, limiting their persuasive value. State v. Anaya, 2008-NMCA-020, ¶ 18, 143 N.M. 431, 176 P.3d 1163 (filed 2007); cf. Incorporated Cnty. of Los Alamos v. Montoya, 108 N.M. 361, 364, 772 P.2d 891, 894 (Ct. App. 1989) (while unpublished opinions from elsewhere may provide guidance, they are not binding on the Court).

The opinion in Philpot provides sounder guidance for resolving the parties' arguments in this case. In Philpot, the court of appeals cited the standard that the Bargmans highlight from McGregor on page 23 of their brief – i.e., that when the terms of the contract "are unreasonably favorable to the other party," the contract is substantively unconscionable, 279 S.W.3d at 579 – a principle which Canyon Transitional does not dispute. (Br. in Chief at 17.) But the court also pointed out that in determining the issue it had to "consider all of the facts and circumstances

of [the] particular case" before it. Id. (internal quotation marks & citation omitted).

In Philpot, the arbitration agreement bound both parties to arbitrate all disputes except for those falling within the jurisdictional limit of small claims court. Id. at 576; see also McGregor, 2010 WL 1730131, at *7 n.2 ($25,000 limit noted). The plaintiff argued that the exception was one-sided "based on the premise . . . that he would never have a claim against the defendants as small as the jurisdictional limit and that the defendants' claims against the plaintiff would always be within the [limit]." Philpot, 279 S.W.3d at 582. The court, after noting the bilateral nature of the exception, id., rejected the plaintiff's contentions because it found "no factual or legal basis for either contention." Id.

Just as in Philpot, this Court should not presume that the Arbitration Agreement is one-sided based upon the Bargmans' contentions. That is especially so given the Bargmans' argument that this Court should disregard relevant considerations, including other terms in the Arbitration Agreement. (Answer Br. at 24.) Such terms, for example, undermine the Bargmans' contention that the Arbitration Agreement was designed to secure lower awards. (Id. 24-25.) That contention finds no support in the actual terms (cf. Brief in Chief at 3-5, 24-26) or in this Court's recently published opinion in Barron v. Evangelical Lutheran Good Samaritan Society, 2011-NMCA-094, ¶ 41, ___ N.M. ___, ___ P.3d ___, cert.

dismissed, 2011-NMCERT-009, ___ N.M. ___, ___ P.3d ___ (No. 33,104 Sept. 14, 2011), which points out the array of damages available under the New Mexico Uniform Arbitration Act (NMUAA). The NMUAA applies in this case. (Id. at 5.)

Though they address different details, the Bargmans' remaining substantive unconscionability arguments (Answer Br. at 25-29) are similarly unsound. What the issues raised by the Bargmans' arguments (id.; see also id. at 18-22) – and the Supreme Court's opinion in Rivera which post-dates the district court's ruling – indicate is that this case should be remanded for factual development relating to the exclusions in the Arbitration Agreement. (See Br. in Chief at 29.) That approach would ensure that a properly informed decision is made regarding the alleged substantive unconscionability of the Arbitration Agreement and, if the collections exclusion is found substantively unconscionable, for a decision to be made on whether – because the Bargmans' claims do not implicate it (R.P. 1-22) – the exclusion could be severed (cf. Answer Br. at 15) and the remainder of the agreement enforced.

Returning to the threshold issue of the analytical approach that a court should apply in analyzing alleged substantive unconscionability, supra pp. 2-4, the points raised by Canyon Transitional in its opening brief (Br. in Chief at 14-22, 28-29) and in this brief, supra pp. 4-12, show that the approach is not as superficial as the district court and the Bargmans seem to think. The applicable standards

instead contemplate a thorough analysis of whether an arbitration agreement unreasonably and unfairly protects one party's interest, which did not occur below.

3. Procedural unconscionability also does not provide a basis for not enforcing the Arbitration Agreement.

The Bargmans contend that the district court erred in not finding the Arbitration Agreement procedurally unconscionable. (Answer Br. at 29-34.) Canyon Transitional clarifies why the ruling (11/22/10 Tr. at 24, 27) was justified on the record before the court

To begin with, unlike now (id. at 30-31), the Bargmans did not previously argue that the Arbitration Agreement was a contract of adhesion. Their lack of record cites reveals as much. So, too, does the fact that below Canyon Transitional pointed out the Bargmans' lack of argument on the issue. (Cf. R.P. 93-98; 11/22/10 Tr. with R.P. 117-19; 11/22/10 Tr. at 5-6.) Because the elements call for specific evidentiary showings, see Guthmann 103 N.M. at 509-10, 709 P.2d at 678-79, and, in turn, a fair opportunity to respond, a right for any reason rationale (Answer Br. at 29-30) does not entitle the Bargmans raise the issue on appeal. State v. Randy J., 2011-NMCA-105, ¶ 28, ___ N.M. ___, ___ P.3d ___, cert. denied, 2011-NMCERT-009, ___ N.M. ___, ___ P.3d ___ (No. 33,170 Sept. 16, 2011).

Perhaps the Bargmans believe (Answer Br. at 30-31) that a statement in the Supreme Court's opinion in Rivera – i.e., "[w]hen assessing procedural

unconscionability courts should consider whether the contract is one of adhesion," 2011-NMSC-033, ¶ 44 – provides an opening. Even if that is so, they rely on "mere assertions and arguments of counsel" which "are not evidence." Muse v. Muse, 2009-NMCA-003, ¶ 51, 145 N.M. 451, 200 P.3d 104 (filed 2008). The lack of evidence means that the Arbitration Agreement may not be deemed a contract of adhesion, see, e.g., Guthmann, 103 N.M. at 509-10, 709 P.2d at 678-79, which warrants heightened scrutiny, Rivera 2011-NMSC-033, ¶ 44.

The Bargmans' overview of procedural unconscionability analysis (Answer Br. at 8-9, 30) is incomplete. Additional factors to be considered include "the use of sharp practices or high pressure tactics . . . as well as the relative scarcity of the subject matter." Guthmann, 103 N.M. at 510, 709 P.2d at 679. What the record must show on the part of the party challenging an agreement is "an absence of meaningful choice." Id. Each case must be analyzed on its own record. See Barron, 2011-NMCA-094, ¶¶ 44-46.

That is not all. "Generally, a party who executes and enters into a written contract with another is presumed to know the terms of the agreement, and to have agreed to each of its provisions in the absence of fraud, misrepresentation or other wrongful act of the contracting party." Smith, 98 N.M. at 545, 650 P.2d at 829. If a party does not understand a term, the party has a duty to clarify the term's

meaning. Gardner-Zemke Co. v. State, 109 N.M. 729, 735, 790 P.2d 1010, 1016 (1990).

This more complete understanding matters because of the Bargmans' contentions. The Bargmans attempt to divert attention from the lack of evidence supportive of their position by drawing analogies to an unpublished opinion in Adkins v. Laurel Healthcare of Clovis, L.L.C., No. 26,759, slip op. (Ct. App. Dec. 19, 2007) (Answer Br. at 31) and to Guthmann (Answer Br. at 32-34). But, here, too, arguments of counsel are not evidence. Supra p. 14 (Muse).

Insofar as they possess evidence, the best that the Bargmans can do is to argue that LoRayne Bargman's alleged ailments prevented her from understanding the terms of the Arbitration Agreement. (Answer Br. at 31-34.) The terms themselves leave the Bargmans with no choice but to take that tack. The terms, which appeared in a separate attachment to the Admissions Agreement, prominently and plainly disclosed what arbitration would entail. (R.P. 65-67, 69; 11/22/10 Tr. at 7.) In initialing and signing the Arbitration Agreement LoRayne Bargman acknowledged that she fully understood all of the terms. (R.P 67, 119-20.) She also acknowledged that she had been given adequate opportunities to review the terms, ask any related questions, and consult an attorney. (R.P. 65, 67, 69-70, 119-20; 11/22/10 Tr. at 7-8.) She further acknowledged that she was freely

and voluntarily consenting to the terms and that she had a choice in selecting Canyon Transitional. (R.P. 67, 70, 119-20; 11/22/10 Tr. at 8.)

Just as they seek to avoid the terms which negate an inference of procedural unconscionability, the Bargmans avoid unhelpful aspects of the evidence in the record. (Answer Br. at 31-33.) Medical records reflect that on the date that she executed the Arbitration Agreement (R.P. 67), Lorayne Bargman was mentally alert (R.P. 104, 120), did not complain of pain (R.P. 120, 125), and rated her pain as moderate when asked (R.P. 107, 120). Although a mini-mental exam that Lorayne Bargman completed while she was a resident at the Canyon Transitional facility reflects that she did not have perfect recall, it also reflects, among other things, that she grasped written and oral instructions and completed a complex counting task, altogether scoring a 24 out of 30 on the exam. (R.P. 94, 109, 120.) In the affidavit which accompanied her response to Canyon Transitional's motion to compel arbitration (R.P. 89, 103), LoRayne Bargman did not aver that a lack of sophistication or education on her part prevented her from understanding the terms, that she asked for additional time to review the Arbitration Agreement or for any related explanations, or that she in any way attempted to negotiate and failed. (R.P. 120.)

Considered as a whole, the circumstances do not meet the standard for procedural unconscionability. The district court correctly found that to be so.[2]

Conclusion

"The doctrine of unconscionability is designed to prevent oppression and unfair surprise." Guthmann, 103 N.M. at 513, 709 P.2d 682. As the record stands, Canyon Transitional does not believe that either standard is met for the reasons it has argued. But, if in light of recent legal developments, this Court concludes that a more developed record is needed to analyze the alleged unconscionability of the Arbitration Agreement, the Court should remand the case for that purpose.

Respectfully submitted,

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[2] Shortly before the filing of this brief, the Court released a slip opinion in Strausberg v. Laurel Healthcare Providers, L.L.C., Ct. App. No. 29,238 (Nov. 4, 2011). If the Court concludes that Strausberg bears on this case, the correct response would be to remand the case for the district court to reconsider its ruling in light of the burden of proof holding in Strausberg. Slip op. ¶¶ 21-23.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing reply brief was served by first-class mail upon the following counsel of record

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this 16th day November 2011.

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

By Jocelyn Drennan
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