COURT OF APPEALS
DECISION
DATED AND FILED

November 14, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP61 **Cir. Ct. No. 2009CV3449**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

DAVID J. FRY,

PLAINTIFF-APPELLANT,

V.

PHILLIPS AND COMPANY SECURITIES, INC.,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Brown County: KENDALL M. KELLEY, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. David Fry appeals an order dismissing his fraud action against Phillips and Company Securities, Inc. because Fry was subject to an arbitration agreement. Fry argues the arbitration clause in the parties' contract

was void because it was not conspicuous and was unconscionable. We reject Fry's arguments and affirm.

BACKGROUND

¶2 The following facts come from Fry's complaint and an affidavit he filed in response to Phillips's motion to compel arbitration. Fry first invested with Phillips in 2005 after a friend referred him to broker George Blanchard. Fry resided in Wisconsin; Blanchard and Phillips were located in the state of Oregon. After serving as Fry's broker for several months, Blanchard suggested that Fry would be "better served" by working with his business partner and wife, Sonnet Blanchard.

¶3 In April 2007, Sonnet recommended that Fry invest in a "very exclusive" investment fund that recently became available. She told Fry the opportunity involved an exclusive arrangement with Phillips for the benefit of its clients. After Fry indicated he wished to invest in the fund, Sonnet e-mailed paperwork she described as "enrollment forms" for him to sign and return, and told him "Phillips would fill out the rest of the information." Fry signed and returned the documents, which included the contract at issue here.

¶4 Fry ultimately suffered investment losses and sued Phillips in a Wisconsin court, alleging fraud. Fry filed his complaint in December 2009, together with a motion for declaratory relief holding that the arbitration clause in the investment contract was void. Phillips contacted Fry's counsel requesting the opportunity to pursue settlement options, and subsequently requested additional time. Eventually, after the applicable Oregon statute of limitations expired, Phillips advised that Fry should voluntarily dismiss the suit with prejudice. It then

moved to compel arbitration in July 2010. The circuit court concluded the arbitration agreement was enforceable, and dismissed Fry's action.

DISCUSSION

¶5 Fry argues the arbitration clause was unenforceable because it was part of an adhesion contract and was not sufficiently conspicuous. Alternatively, he argues the clause is unconscionable.

¶6 The contract at issue, titled a "Concentrated Equity Return Strategy Investment Management Agreement," is approximately three and one-half pages long. The contract consists of sixteen separate sections, each set off with a blank space between sections. Every section is identified by number in italics, followed by a title that is capitalized and underlined. Thus, the pertinent section commences:

> *Section X* Binding Arbitration: If at any time during the term of the Agreement any … controversy shall arise among the parties hereto … such … controversy shall be submitted to and determined by arbitration …. [B]y signing this agreement, client agrees to waive … rights to alternate forums and submits to mandatory arbitration if requested by Adviser in response to a dispute. …

¶7 Fry argues that because arbitration clauses in form contracts require parties to waive important rights, they must be treated similarly to indemnity, exculpatory, and maritime forum-selection clauses. *See* ***Deminsky v. Arlington Plastics Mach.***, 2003 WI 15, ¶28, 259 Wis. 2d 587, 657 N.W.2d 411; ***Yauger v. Skiing Enters., Inc.***, 206 Wis. 2d 76, 86-89, 557 N.W.2d 60 (1996); ***Johnson v. Holland Am. Line-Westours, Inc.***, 206 Wis. 2d 562, 569-70, 557 N.W.2d 475 (Ct. App. 1996). Thus, he contends the arbitration clause here was subject to what he describes as a "conspicuity doctrine" and/or a "reasonabl[e] communicativeness

test." From there, Fry argues the contract here was one of adhesion and contained an arbitration clause that was not sufficiently conspicuous.

¶8 Initially, we observe that Fry's conspicuousness argument is rather weak. While the entire contract consists of relatively small print, the clear and unambiguous arbitration clause is set forth as an independent section and identified by an italicized number and underlined title. Moreover, the two-paragraph section concludes with a line indicating "*Arbitration Disclosures*:" followed by four bullet-pointed one- or two-line disclosures. These disclosures include statements that arbitration is final and binding and that the parties are waiving their rights to seek remedies in court proceedings. In ***Deminsky***, 259 Wis. 2d 587, ¶28, the court adopted the conspicuousness standards set forth in the Uniform Commercial Code, which currently provides, in part: "'Conspicuous,' with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it." WIS. STAT. § 401.201(2)(f).[1] We need not, however, resolve whether a conspicuity rule

[1] ***Deminsky*** adopted an earlier version of the statutory definition, but the current version is substantially similar. *See* ***Deminsky v. Arlington Plastics Mach.***, 2003 WI 15, ¶28, 259 Wis. 2d 587, 657 N.W.2d 411. The current version of the statute further explains:

> Conspicuous terms include any of the following:
>
> 1. A heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size.
>
> 2. Language in the body … in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

WIS. STAT. § 401.201(2)(f)1.-2. All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

applies to arbitration clauses or, if so, whether the provision here was sufficiently conspicuous.

¶9 Rather, we agree with the circuit court that the parties' investment agreement was not a contract of adhesion in the first place. "A contract of adhesion is generally found under circumstances in which a party has, in effect, no choice but to accept the contract offered, often where the buyer does not have the opportunity to do comparative shopping or the organization offering the contract has little or no competition." ***Deminsky***, 259 Wis. 2d 587, ¶31.

¶10 Fry chose to seek out and hire a financial advisor in Oregon rather than retain a readily available local advisor. Additionally, the record indicates Fry was an experienced businessperson with substantial assets. Fry argues, however, that the availability of alternative service providers does not defeat his argument, suggesting the contract was presented on a "take it or leave it basis" and he "lack[ed] input into the contract's terms."

¶11 Alternative providers aside, the contract was not overly one-sided or nonnegotiable. While it was a form contract, the investment agreement reserved substantial authority to Fry. For instance, Fry was to select one of three growth tracks in which to invest his funds. Thus, he was free to elect his level of risk. The agreement also provided multiple blank lines for Fry to insert "[*a*]*ny* special instructions or limits that Client wishes Adviser to follow." (Emphasis added.) The agreement further provided that Fry could revise his investment objectives. Fry was also permitted to opt out of a special trading authorization regarding stop orders. Finally, Fry could terminate the agreement at any time for any reason upon thirty days' notice, and could also terminate it within five business days after entering into the contract.

¶12 In a related argument, Fry argues the arbitration clause is void because it is unconscionable. "Unconscionability has often been described as the absence of meaningful choice on the part of one of the parties, together with contract terms that are unreasonably favorable to the other party." ***Wisconsin Auto Title Loans, Inc. v. Jones***, 2006 WI 53, ¶32, 290 Wis. 2d 514, 714 N.W.2d 155. To be voidable, an arbitration agreement must be "both procedurally and substantively unconscionable." ***Id.***, ¶29. The more substantive unconscionability present, the less procedural unconscionability is required, and vice versa. ***Id.***, ¶33.

¶13 To determine procedural unconscionability, the court considers "factors that bear upon the formation of the contract, that is, whether there was a 'real and voluntary meeting of the minds.'" ***Id.***, ¶34. The factors considered include but are not limited to:

> age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms would have been permitted by the drafting party, and whether there were alternative providers of the subject matter of the contract.

Id. Substantive unconscionability refers to whether the contract is unreasonably favorable to the more powerful party. ***Id.***, ¶36. The substantive unconscionability inquiry involves determining whether the contract terms are commercially reasonable. ***Id.***

¶14 Addressing procedural unconscionability, Fry again argues the agreement was an adhesion contract and the arbitration provision was not conspicuous. Further, he asserts he never read the contract before signing it

because he was told he was merely signing enrollment forms. Thus, Fry claims he was deceived.

¶15 We have already determined that the investment agreement did not constitute a contract of adhesion. Next, it would appear that Fry forfeited any conspicuousness claim by failing to review the document in the first place. *See* ***Deminsky***, 259 Wis. 2d 587, ¶30. Regardless, as noted above, the arbitration provision was not particularly inconspicuous. We also see no deception in describing the investment agreement as an enrollment form; it was precisely that. Indeed, many enrollment forms will constitute a contract. Thus, Fry failed to read the contract at his own risk. *See* ***id.***

¶16 Fry fails to address the remaining procedural unconscionability factors. We observe, however, that Fry was an adult and an experienced businessperson. He does not claim to be uneducated or of below average intelligence. Moreover, because Fry received and sent the enrollment forms by e-mail, he was unlikely to feel pressured into signing the contract. The contract also allowed Fry an additional five days to review the contract and withdraw from it without penalty. Finally, it does not appear that either party was at a substantial bargaining advantage. Although Phillips drafted the form contract, Fry was free to take his money elsewhere.

¶17 Fry argues the arbitration clause was substantively unconscionable because it required that arbitration take place in Oregon and the specified arbitrator's rules authorize awards of filing fees and attorney fees to a prevailing party. We see no commercial unreasonableness in an Oregon financial adviser requiring that its clients agree to arbitration in Oregon. Regarding fee awards, Fry fails to acknowledge that both rules merely authorize such awards if consistent

with applicable law or the contract. The arbitration clause applied equally to both parties and was not commercially unreasonable in any manner. Indeed, arbitration may be more advantageous to consumers than court proceedings because it is a less formal, less expensive, and more expedient forum. *See* ***Allied-Bruce Terminix Cos. v. Dobson***, 513 U.S. 265, 280 (1995).

¶18 Fry also emphasizes that Phillips caused delay by seeking time to negotiate only to later propose that Fry dismiss his suit after the Oregon statute of limitations had expired. Fry asserts, "Arbitration supposedly speeds-up the resolution of claims, not prolongs it." This argument fails for two reasons. First, it was Fry who caused delay in the first place by opposing arbitration. He therefore cannot point the finger of delay at Phillips. Second, subsequent case strategy cannot somehow reach back to render a contract unconscionable. In any event, Phillips agreed to toll the statutes of limitation during the period of negotiation delay. We conclude, as did the circuit court, that the arbitration clause was neither procedurally nor substantively unconscionable.

By the Court.—Order affirmed.

This opinion will not be published. *See* Wis. Stat. Rule 809.23(1)(b)5.