COURT OF APPEALS
DECISION
DATED AND FILED

December 11, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP305 **Cir. Ct. No. 2011CV22**

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

JEFFREY L. ENGEDAL,

PLAINTIFF-RESPONDENT,

V.

MENARD, INC.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Eau Claire County: PAUL J. LENZ, Judge. *Reversed.*

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

¶1 PER CURIAM. Menard, Inc. (Menards) appeals an order denying its motion to compel arbitration of Jeffrey Engedal's wrongful discharge and breach of contract claims. The circuit court concluded the arbitration provision in

Engedal's employment agreement was unconscionable and, therefore, unenforceable. We conclude the arbitration provision is not procedurally unconscionable. We therefore reverse.

BACKGROUND

¶2 Menards hired Engedal as a part-time sales associate in 1985, when he was eighteen years old. In 1991, Engedal was promoted to store manager. In 2006, he became Menards' hardware merchandise manager, a position that gave him managerial authority over the hardware departments in all of Menards' 250 stores. Menards terminated Engedal's employment on August 19, 2010.

¶3 From 1991 until his termination, Engedal's employment at Menards was governed by a series of employment agreements, which Engedal signed on a yearly basis. The 2010 agreement contained two provisions that are relevant to this case: a noncompete clause and an arbitration provision. The noncompete clause provided that, for twenty-four months after termination of his employment with Menards, Engedal would not: (1) accept employment with any of Menards' direct competitors "in the same or similar capacity for which [he was] employed by Menards[;]" or (2) accept employment in any capacity with any of Menards' direct or indirect competitors within a 100 mile radius of the Menards location where he was last employed.

¶4 The arbitration provision stated, in relevant part:

> [Y]ou agree that all problems, claims, and disputes experienced within your work area and/or related to your employment with Menards, if you are currently employed by Menards, shall first be resolved as outlined in the Team Member Relations section of the *Grow With Menards Team Member Information Booklet*, which you have received. If you are unable to resolve the dispute by these means, choose not to utilize such means, or you are no longer

> employed by Menards you agree to submit your dispute(s) to final and binding arbitration. … Menards agrees that it shall submit any and all claims it may have, if any, in compliance with this section, except as provided in paragraph 8 of this Agreement.

Paragraph 8 provided that, if Engedal breached the noncompete clause or a separate nondisclosure clause, Menards could go to court to "obtain temporary and permanent injunctive relief[.]"

¶5 On January 7, 2011, Engedal filed the instant lawsuit against Menards, asserting a claim for wrongful discharge. He also alleged Menards breached the employment agreement by refusing to pay him a bonus he would have been eligible to receive had he remained employed through the end of 2010. In addition, he sought a declaratory judgment that the noncompete clause and arbitration provision were unenforceable.

¶6 Menards moved to stay the proceedings and compel arbitration. Following an evidentiary hearing, the circuit court denied Menards' motion, concluding the arbitration provision was both procedurally and substantively unconscionable.

¶7 Addressing procedural unconscionability, the court noted that when Engedal signed the 2010 employment agreement, he was subject to a noncompete clause that would have prevented him from working for Menards' competitors for two years.[1] Thus, the court concluded Menards had greater bargaining power than

[1] Engedal signed the 2010 employment agreement on December 16, 2009. At that time, he was subject to the 2009 employment agreement. The 2009 agreement is not part of the record on appeal. The parties and the circuit court proceeded under the assumption that the 2009 agreement contained the same noncompete clause as the 2010 agreement. We accept that assumption as true for purposes of this appeal.

Engedal because, had Engedal declined to sign the agreement, he would have been unable to find employment elsewhere in his field for two years. Additionally, the court noted that, although many of the agreement's terms were negotiable, Menards drafted the agreement and was not amenable to changing certain provisions. The court also concluded the arbitration provision had "a high level of substantive unconscionability" because it permitted Menards to seek injunctive relief in the circuit court, but it did not grant Engedal a comparable right of access. Menards petitioned this court for leave to appeal the order denying its motion to compel arbitration, and we granted the petition.

DISCUSSION

¶8 Determining whether a contractual provision is unconscionable involves questions of fact and law. ***Wisconsin Auto Title Loans, Inc. v. Jones***, 2006 WI 53, ¶25, 290 Wis. 2d 514, 714 N.W.2d 155. We will not set aside the circuit court's findings of fact unless they are clearly erroneous. ***Id.*** However, whether the facts found by the circuit court render a contractual provision unconscionable is a question of law that we review independently. ***Id.***

¶9 "Unconscionability is an amorphous concept that evades precise definition." ***Id.***, ¶31. It 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. ***Id.***, ¶32. For a contract to be found unconscionable, it must exhibit both procedural and substantive unconscionability. ***Aul v. Golden Rule Ins. Co.***, 2007 WI App 165, ¶26, 304 Wis. 2d 227, 737 N.W.2d 24. Thus, if we determine the contract was not procedurally unconscionable, we may uphold the contract without addressing substantive

unconscionability. *See* ***Cottonwood Fin., Ltd. v. Estes***, 2012 WI App 12, ¶7, 339 Wis. 2d 472, 810 N.W.2d 852.

¶10 Determining whether procedural unconscionability exists requires us to examine factors that bear upon the formation of the contract to see whether the contracting parties had a real and voluntary meeting of the minds. ***Wisconsin Auto Title***, 290 Wis. 2d 514, ¶34. The relevant factors include the parties' age, education, intelligence, business acumen and experience, their 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.***

¶11 Here, the circuit court determined that the parties' age, education, intelligence, and business experience weighed against a finding of procedural unconscionability. We agree. The circuit court found that Menards is "a large corporation with annual sales of approximately $9 billion." However, it also found that Engedal was forty-three years old when he signed the 2010 employment agreement, he had completed high school and two years of college, and he had "above average intelligence." He was employed as a store manager for fifteen years, during which time he was responsible for all the operations of his store and supervised approximately 125 employees. He then attained a high-level management position at Menards' corporate headquarters, which required him to directly supervise at least 60 employees and exercise authority over the hardware departments in 250 stores. He was also responsible for developing and maintaining business relationships with 600 to 700 hardware vendors. These facts establish that, when Engedal signed the 2010 employment agreement, he was an intelligent adult with some college education and significant business experience.

¶12 The circuit court also considered whether the contract's terms were explained to Engedal. Although there was no evidence that Menards actually explained the terms, the court noted that Engedal "had the opportunity to ask questions about the contract and had the time to review it." The court also found that, as both store manager and hardware merchandise manager, Engedal was "the primary contact to explain the terms and conditions of any Employment Agreement" to his staff. Additionally, Engedal signed each page of the 2010 agreement, indicating that he read and understood its contents. We agree with the circuit court that these facts weigh against a finding of procedural unconscionability.

¶13 However, the circuit court nevertheless found the arbitration provision procedurally unconscionable, based on the remaining factors. The court first concluded Menards had greater bargaining power than Engedal because Engedal was subject to a noncompete clause that would have "put [him] out of a job" for two years had he refused to sign the 2010 employment agreement. For the same reason, the court determined Engedal could not find any alternative providers for the subject matter of the contract—that is, employment. We disagree.

¶14 The court's reasoning conflicts with its own factual finding that, had Engedal refused to sign the 2010 employment agreement, Menards would have offered him a different position within the corporation. On appeal, Engedal argues the notion that he would have been offered a different position is "highly illusory[.]" He points out that John Bogumill, Menards' wall coverings merchandise manager, testified he was unaware of any employee remaining at Menards after refusing to sign an employment agreement. However, the court's finding that Engedal would have been offered another position was based on the

testimony of Russ Radtke, Menards' chief merchant. The circuit court was entitled to accept Radtke's testimony. *See* ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345 ("When the circuit court acts as the finder of fact, it is the ultimate arbiter of the credibility of the witnesses and the weight to be given to each witness's testimony."). The court's finding that Engedal would have been offered a different position at Menards is not clearly erroneous.

¶15 Furthermore, the facts do not support the court's conclusion that Engedal would have been unable to find other employment for two years had he refused to sign the 2010 employment agreement. The court noted that the noncompete clause barred Engedal from working for Menards' competitors, and the court assumed Engedal was unqualified for any other employment. However, there is no support in the record for the court's conclusion that Engedal's managerial, supervisory, and organizational skills were not transferable outside the "home improvement mega store" industry. The court's reasoning also ignores the fact that, after Engedal lost his job at Menards, he was hired as a general manager at Hubbard Scientific in Chippewa Falls. Although his employment there was ultimately terminated, it was because of a reduction in force, not because Engedal was unqualified or unable to perform his duties.

¶16 Moreover, Wisconsin law would prohibit an arbitrator or a court from applying the noncompete clause in a way that would render Engedal completely unemployable. Wisconsin law disfavors noncompete agreements. *See* WIS. STAT. § 103.465;[2] ***H & R Block E. Enters., Inc. v. Swenson***, 2008 WI App

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

3, ¶13, 307 Wis. 2d 390, 745 N.W.2d 421. They are regarded with suspicion, ***Farm Credit Servs. of N. Cent. Wis., ACA v. Wysocki***, 2001 WI 51, ¶9, 243 Wis. 2d 305, 627 N.W.2d 444, and may not be harsh or oppressive to the employee, ***H & R Block***, 307 Wis. 2d 390, ¶13. A noncompete clause that rendered the employee completely unemployable for two years would certainly be harsh and oppressive.

¶17 Finally, Menards argues that, if the noncompete clause in this case were sufficient to create an imbalance of bargaining power great enough to establish procedural unconscionability, then nearly every employment agreement entered into while the employee was subject to noncompete restrictions would be procedurally unconscionable. Menards argues this result would be a "broad expansion of procedural unconscionability" unsupported by Wisconsin or federal law. Engedal does not respond to Menards' argument, and we therefore deem it conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶18 The circuit court also based its finding of procedural unconscionability on the fact that Menards drafted the employment agreement and did not allow Engedal to negotiate certain terms. We do not agree that these facts render the agreement procedurally unconscionable. Although Menards was not amenable to changing certain contract provisions, including the noncompete clause and the arbitration provision, the court found that Engedal was able to negotiate terms relating to his compensation, his management bonus, and his performance goals. Furthermore, even if the agreement had been a pure adhesion contract, that fact alone would not be sufficient to establish procedural unconscionability. *See* ***Wisconsin Auto Title***, 290 Wis. 2d 514, ¶53 ("Ordinarily, however, adhesion contracts are valid."); *see also* ***Aul***, 304 Wis. 2d 227, ¶27.

¶19 The facts of this case do not support a finding that the arbitration provision in Engedal's employment agreement was procedurally unconscionable. Accordingly, the arbitration provision was not unconscionable. *See* ***Aul***, 304 Wis. 2d 227, ¶26 (unconscionable contract must be both procedurally and substantively unconscionable). The circuit court therefore erred by denying Menards' motion to stay the proceedings and compel arbitration.

By the Court.—Order reversed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.