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Briefs and Other Related Documents

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Court of Appeal, Fourth District, Division 3, California.

Mary K. HARVEY et al., Plaintiffs and Respondents,
v.
KATELLA MOBILEHOME ESTATES, L.P., et al., Defendants and Appellants.

No. G031737.
(Super.Ct.No. 02CC14135).

Oct. 28, 2003.

Appeal from an order of the Superior Court of Orange County, Randell L. Wilkinson, Judge. Affirmed.

Berger Kahn, Arthur Grebow and Alex Y. Wong for Defendants and Appellants.

Endeman, Lincoln, Turek & Heater, James C. Allen, Linda B. Reich and Kimberly K. Harris for Plaintiffs and Respondents.

OPINION

ARONSON, J.

***1** Defendant Katella Mobilehome Estates, L.P., the owner/operator of a Stanton mobile home park, appeals from an order denying its motion to compel arbitration in an action for nuisance, breach of contract, and unfair business practices filed by 95 current and/or former park residents. Defendant complains the residents' claims were the subject of a valid arbitration clause, and the court's failure to sever any unconscionable provisions was an abuse of discretion. For the reasons set forth below, we affirm.

I

All the respondents own and live in mobile homes stationed on spaces rented from the park owner. At various points in time, a large majority of the residents signed long-term lease agreements containing a broad form arbitration clause. Among other things, the agreement provided the costs of the arbitration would be shared equally between the parties, and one-half of these fees would be paid in advance.

In June 2001, various park residents, including several month-to-month tenants, weary of allegedly excessive rents and slum-like conditions, demanded arbitration of their claims. Opposing the request, the attorney for the park

owners maintained any resident who had not signed a lease agreement had no standing or right to participate in the arbitration. The proceeding was dismissed without prejudice just before a retired judge at JAMS was scheduled to hold a hearing on the standing issue.

More than a year later, in September 2002, respondents tried a different tack, suing the park operator for its failure to maintain common facilities, in violation of the Mobilehome Residency Law (MRL). (Civ.Code, § 798 et seq.) Also alleged were causes of action for nuisance, breach of contract and the covenant of good faith and fair dealing, negligence, unfair business practices, breach of the warranty of habitability, and declaratory relief. The park owner moved to compel arbitration and to stay the action, pursuant to Code of Civil Procedure section 1280 et seq. Respondents' opposition raised a multi- part challenge to the enforceability of the agreement under California law.

The trial court denied the motion, concluding the arbitration agreement could not be enforced because: (1) certain residents never signed it; (2) it contained a waiver of the right to prosecute a civil action for a public nuisance under the MRL, in violation of public policy; (3) each side was required to advance half the cost of the arbitration in advance; (4) it improperly curtailed the applicable statute of limitations; (5) the specified notice requirements conflicted with the provisions of the MRL; (6) no class action or joint plaintiff lawsuits were permitted; (7) only the residents, and not the park owner, were required to resolve their claims through arbitration; and (8) overall, the provisions were "wholly one-sided, unconscionable, unreasonable and unjust." This appeal followed.

II

We treat first with the issue of whether the arbitration agreement set forth in the mobile home lease agreement contains enforceable compulsory arbitration provisions. [FN1] In *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83 (*Armendariz*), the California Supreme Court ruled mandatory employment arbitration agreements are enforceable if the arbitration meets certain "minimum" requirements, including a neutral arbitrator, the provision of adequate discovery, a written decision or award sufficient to permit a limited form of judicial review, provision of all the types of relief otherwise available in a court action, and limitations on the cost of arbitration. (*Id.* at p. 102.) Plaintiffs concede the plan passes muster on the first three points, **but maintain the arbitration program offered falls short on the last two requirements**, rendering the entire agreement unenforceable.

> FN1. We note the initial arbitration action filed by certain park residents was dismissed without prejudice before any action was taken or decision was rendered in that matter. The trial court found this initial request for arbitration did not result in a waiver of any right to challenge the validity of the arbitration agreement. We agree. Park owners do not cite, nor has our independent research revealed, any authority to support that proposition. (Cf. *Bayscene Resident Negotiators v. Bayscene Mobilehome Park* (1993) 15 Cal.App.4th 119, 129 [party who questions validity of arbitration proceedings may not proceed with arbitration and still preserve issue for later consideration by court after unfavorable result in arbitration].)

***2** As *Armendariz* explains, an arbitration agreement is unenforceable if it is both procedurally *and* substantively unconscionable. (*Armendariz, supra,* 24 Cal.4th at p. 114.) But "[t]hese elements ... need not be present in the same degree. '[T]he 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.' " (*Mercuro v. Superior Court* (2002) 96 Cal.App.4th 167, 174.) Procedural unconscionability involves a consideration of the parties' relative bargaining power and the clarity of the contractual terms. Substantive unconscionability, on the other hand, requires a determination of whether the contract's terms are unduly harsh or oppressive. (*Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519.)

Respondents note the arbitration agreement at issue here was drafted by the park owner, a party with superior bargaining power, and offered to park residents on essentially a "take it or leave it" basis, with no real opportunity

for negotiation. (See *Galland v. City of Clovis* (2001) 24 Cal.4th 1003, 1010 [noting economic imbalance of power in favor of mobilehome park owners]; see also Civ.Code, § 798.55 [legislative finding that special circumstances of mobilehome ownership demands unique protection from actual or constructive eviction].) We agree the agreement is procedurally unconscionable, as the park owner possesses considerably more bargaining power than any of the residents. Viewed from any angle, the agreement is entirely a one-sided proposition.

We are also of the opinion the agreement is substantively unconscionable. Paragraph 6.9 requires the mobilehome owner to **advance half the cost of the arbitration, and warns any failure to pay such fees will result in a forfeiture of the right to prosecute or defend any claim, in any forum. [FN2] Thus, the cost of this program would be greater than the expenses any of the residents would bear in a superior court action.**

> **FN2. "COSTS FOR THE ARBITRATION AND REFERENCE SHALL BE ADVANCED EQUALLY BETWEEN U.S. DUE AND PAYABLE ON DEMAND.... FAILURE OF ANY PARTY TO MAKE SUCH A DEPOSIT ... SHALL RESULT IN A FORFEITURE BY THE NON-DEPOSITING PARTY OF THE RIGHT TO PROSECUTE OR DEFEND THE CLAIM WHICH IS THE SUBJECT OF THE ARBITRATION."**

On this particular point, *Armendariz* deserves a closer look. "Code of Civil Procedure section 1284.2 provides that unless the arbitration agreement provides otherwise, each party to the arbitration must pay his or her pro rata share of arbitration costs. But section 1284.2 is a default provision, and *the agreement to arbitrate a statutory claim* is implicitly an agreement to abide by the substantive remedial provisions of the statute." (*Armendariz, supra,* 24 Cal.4th at p. 112, italics added.) *Armendariz* involved arbitration of claims under a statute (Gov.Code, § 12900 et seq.), the California Fair Employment and Housing Act (FEHA). In the context of FEHA claims, *Armendariz* held the employer is impliedly obligated to pay all costs unique to the arbitration, and the provisions of Code of Civil Procedure section 1284.2 do not apply in this context. (*Armendariz, supra,* 24 Cal .4th at pp. 112-113.)

***3** As at least one commentator has observed, "[w]here only *nonstatutory* claims exist, there generally is no requirement that arbitration costs be borne by the employer...." (Knight et al., Cal. Practice Guide: Alternative Dispute Resolution (The Rutter Group 1992) ¶ 5:155.10, p. 5-79 (rev.# 1, 2002); see *Little v. Auto Stiegler, Inc.* (2003) 29 Cal.4th 1064, 1081-1085; *Armendariz, supra,* 24 Cal.4th at p. 113.) **Here, however, the residents' claim arises under the MRL. (Civ.Code, § 798 et seq.) Requiring the advance payment of costs forces a resident seeking to vindicate his or her statutory rights to pay for the services of an arbitrator in circumstances where they would not be required to pay for the services of a judge in court. Accordingly, we find this provision is invalid as it effectively waives the resident's right to maintain a "civil action" under Civil Code section 798.87, subdivision (c). (See *California Teachers Assn. v. State of California* (1999) 20 Cal.4th 327, 354-355.)**

Next, as the trial court observed, **we note the agreement improperly "applies to actions brought by residents, and excepts any suits brought by [the] park owner**." Thus, park residents are obligated to arbitrate almost any claim they might have against the park owner, but this is basically a one-way street--the agreement exempts from arbitration the precise types of actions a park owner would most likely assert against the residents. **Along the same lines, we note the park owner has the power to terminate the provisions of the arbitration agreement on 60 days written notice, an ability the residents do not share**. Put another way, the agreement compels residents to arbitrate their claims, but the park owner is under no similar obligation and may instead pursue its claims in a superior court action. "Given the basic and substantial nature of the rights at issue, we find that the unilateral obligation to arbitrate is itself so one- sided as to be substantively unconscionable." (*Kinney v. United HealthCare Services, Inc.* (1999) 70 Cal.App.4th 1322, 1332.)

Similarly, the arbitration agreement also narrows the applicable statutes of limitation for the initiation for the arbitration process. Under paragraph 6.5 of the agreement, park residents have only one year to initiate the arbitration process following "THE DATE YOU OR ANY MEMBER OF YOUR HOUSEHOLD FIRST BECAME

(Cite as: 2003 WL 22436265 (Cal.App. 4 Dist.))

AWARE OF (OR REASONABLY SHOULD HAVE BEEN AWARE OF) THE DISPUTE." If no request is made within that time, the resident agrees the park owner "WILL NOT BE LIABLE TO YOU FOR ANY INJURY OR DAMAGE YOU OR OTHERS IN YOUR HOUSEHOLD MAY EXPERIENCE AND, THEREFORE, THAT DISPUTE WILL NOT BE SUBJECT TO ARBITRATION OR ANY PROCEEDING IN THE COURTS." **By any stretch of the imagination, this is no substitute for the three- and four-year statutes of limitations prescribed for nuisance and breach of a written contract. (E.g., Code Civ. Proc., § § 337, 338.) True, California law allows parties to contractually shorten the applicable statute of limitations, but such arrangements have "never been recognized outside the context of straightforward transactions in which the triggering event for either a breach of contract or for the accrual of a right is immediate and obvious."** (*Moreno v. Sanchez* (2003) 106 Cal.App.4th 1415, 1430.)

***4** As the respondents correctly note, it is entirely possible residents may not attribute certain conditions in a mobilehome park to the owner's failure to maintain common facilities (e.g., electrical, water, or sewer systems) within the prescribed one-year time period. **Given MRL's expressed policy to lengthen, rather than shorten, the applicable statute of limitations, we find this provision of the arbitration agreement invalid as well. (Civ.Code, § 798.84, subd. (e) ["If the notice [of a homeowner's intent to commence an action] is served within 30 days of the expiration of the applicable statute of limitations, the time for the commencement of the action shall be extended 30 days from the service of the notice"].)**

Along the same lines, the trial court correctly concluded the arbitration agreement improperly imposed notice requirements in direct conflict with the provisions specified by the MRL (Civ.Code, § 798.84, subd. (b) [notice of specific allegation by one homeowner deemed sufficient on behalf of all other park homeowners]), **but did not require the park owner to give notice of any kind before commencing arbitration**.

Similarly, the agreement prohibited residents from bringing a class action or joint lawsuit without the park owner's consent. (See *Keating v. Superior Court* (1982) 31 Cal.3d 584, 609- 610, overruled on other grounds in *Southland Corp. v. Keating* (1984) 465 U.S. 1 [unfair advantage to wrongdoer if individual arbitration proceedings used to block an otherwise appropriate class action]; *Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094, 1100-1101.)

Finally, we note an arbitration agreement cannot be enforced where it is "permeated by an unlawful purpose." (*Armendariz, supra,* 24 Cal.4th at pp. 124-125.) On the issue of severance, *Armendariz* explained a court must "look to the various purposes of the contract. If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced. If the illegality is collateral to the main purpose of the contract, and the illegal provision can be extirpated from the contract by means of severance or restriction, then such severance and restriction are appropriate." (*Id.* at p. 124.) We note "the doctrine of severance attempts to conserve a contractual relationship if to do so would not be condoning an illegal scheme. [Citations.] The overarching inquiry is whether ' "the interests of justice ... would be furthered" ' by severance." (*Ibid.*) That is clearly not the case here.

In this case, as in *Armendariz,* "the arbitration agreement contains more than one unlawful provision.... Such multiple defects indicate a systematic effort to impose arbitration on [a party] not simply as an alternative to litigation, but as an inferior forum that works to the [other party's] advantage." (*Armendariz, supra,* 24 Cal.4th. at p. 124.) Combining the element of procedural unconscionability with the multiple unlawful substantive provisions, we find the "trial court did not abuse its discretion in concluding that the arbitration agreement is permeated by an unlawful purpose." (*Ibid.*) [FN3] We are left with but one conclusion, i.e., the entire arbitration agreement is unenforceable. [FN4]

FN3. Arguing in the alternative, the park owner suggests the solution is to sever any unconscionable clauses. (See, e.g., *Bolter v. Superior Court* (2001) 87 Cal.App.4th 900 (*Bolter*).) *Bolter,* an opinion issued by a different panel of this court, is procedurally distinguishable. In that case, the trial court concluded a provision in a franchise agreement compelling any arbitration to be held in Utah was not unconscionable

and issued an order to dismiss the superior court action. In effect, the clause required franchisees to "close down their shops, pay for airfare and accommodations in Utah, and absorb the increased costs associated in having counsel familiar with Utah law." (*Id.* at p. 909.) The franchisees filed a writ petition challenging the trial court's ruling, and we issued an order to show cause and a temporary stay of the arbitration. The facts were not in dispute. Standing in the trial court's shoes, we reviewed the matter de novo, concluding the unconscionable provisions could be severed, "and the rest of the agreement enforced." (*Id.* at p. 910.) Thus, the unconscionability could be "cured by striking those provisions, leaving an otherwise valid and complete agreement to submit disputes to arbitration." (*Id.* at p. 911.) Here, we are limited to a review of the trial court's exercise of its discretion on the issue of severability. Because the facts and procedural posture are different in this case, our conclusion is not inconsistent with the result in *Bolter*.

FN4. The park owner also argues the superior court action should be stayed as to some 20 residents who did not sign the arbitration agreement, pending the outcome of the arbitration proceeding involving the signatory parties. Given our conclusion the arbitration agreement cannot be enforced, we need not discuss this issue further.

***5** The order denying the motion to compel arbitration is affirmed. Respondents shall recover their costs on appeal.

WE CONCUR: BEDSWORTH, Acting P.J., and IKOLA, J.

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•Mary K. HARVEY, et al., Plaintiffs and Respondents, v. KATELLA MOBILEHOME ESTATES, L.p., et al., Defendants and Appellants., 2003 WL 22718425 (Appellate Brief) (Cal.App. 4 Dist. April 10, 2003), Appellants' Opening Brief

•Mary K. HARVEY, et al., Plaintiffs and Respondents, v. KATELLA MOBILEHOME ESTATES, L.P. et al., Defendants and Appellants., 2003 WL 22718424 (Appellate Brief) (Cal.App. 4 Dist. June 12, 2003), Appellant's Reply Brief

2003 WL 22436265 (Cal.App. 4 Dist.) Not Officially Published, (Cal. Rules of Court, Rules 976, 977)

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