

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

LARRY LINKOUS,	:	APPEAL NO. C-170276
		C-170323
Plaintiff-Appellant,	:	TRIAL NO. A-1604479
vs.	:	
		<i>JUDGMENT ENTRY.</i>
PROSPECT FUNDING HOLDINGS,	:	
L.L.C.,	:	
Defendant-Appellee.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. See Rep.Op.R. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Plaintiff-appellant Larry Linkous had a workers' compensation claim arising from an automobile accident. He signed a contract for a non-recourse civil litigation advance with the defendant-appellee, Prospect Funding Holdings, L.L.C. ("Prospect"). R.C. 1349.55 defines a "non-recourse civil litigation advance" as a "transaction in which a company makes a cash payment to a consumer who has a pending civil claim or action in exchange for the right to receive an amount out of the proceeds of any realized settlement, judgment, award, or verdict the consumer may receive in the civil lawsuit." The contract between Linkous and Prospect was contingent upon Linkous's successful resolution of his workers' compensation case. The contract was for \$2000 and had a \$720 processing fee. It also included an interest-rate charge of 60 percent over the first six months, 40 percent between the next six-to-12 months, 30 percent between 12-to-18 months, and 20 percent every six months thereafter. The contract also contained a

OHIO FIRST DISTRICT COURT OF APPEALS

provision agreeing to arbitration “in any action or proceeding with respect to this agreement.” The attorney representing Linkous in his workers’ compensation case signed an acknowledgment of the agreement between Linkous and Prospect.

Linkous filed for a declaratory judgment, asking the trial court to find the contract unconscionable under Ohio law. Prospect did not file a timely answer, and the trial court granted a partial default judgment. The court held that it would deem the allegations in Linkous’s amended complaint to be true, but that it would independently assess the legal issues before rendering final judgment. Linkous filed a motion for judgment on the pleadings, and Prospect filed a motion to dismiss or to stay the proceedings pending arbitration. The trial court denied Linkous’s motion for judgment on the pleadings and Prospect’s motion to dismiss and granted the motion to stay Linkous’s declaratory judgment action pending arbitration, upon its finding that Linkous had failed to establish that the arbitration clause was unconscionable or otherwise unenforceable.

Linkous appealed the trial court’s decision pursuant to R.C. 2711.02(C), which permits an appeal from the granting or denial of a motion for a stay pending arbitration. *Jarvis v. Lehr*, 1st Dist. Hamilton No. C-130832, 2014-Ohio-3567 ¶ 7; *Rippe & Kingston Co., PSC v Kruse*, 1st Dist. Hamilton No. C-130587, 2014-Ohio-2428 ¶ 14. Prospect filed a cross appeal, assigning as error the denial of its motion to file an answer out of time and the partial granting of Linkous’s motion for default judgment.

Linkous’s sole assignment of error is that the trial court erred in overruling his motion for judgment on the pleadings while granting Prospect’s motion to stay the proceedings pending arbitration. We review de novo a determination whether an arbitration agreement is enforceable in light of a claim of unconscionability. *Taylor Bldg. Corp. of Am. v. Benefield*, 117 Ohio St.3d 352, 2008-Ohio-938, 884 N.E.2d 12, ¶

37; *Hayes v. Oakwood Home*, 122 Ohio St.3d 63, 2009-Ohio-2054, 908 N.E.2d 408, ¶ 21.

Linkous argues that the trial court should have denied the motion to stay pending arbitration, because the contract is unconscionable. He alleges that the contract violates R.C. 1349.55, which regulates non-recourse civil litigation advance contracts. Specifically, Linkous argues that the contract did not contain the 12-point-type and the language that the statute requires. *See* R.C. 1349.55(B). For a contract to be unconscionable, a party must demonstrate that it is both procedurally and substantively unconscionable. *Hayes* at ¶ 20. In addition, where a contract contains a clause providing that disputes arising from the contract shall be decided by an arbitrator, a party seeking to avoid arbitration must show that the arbitration clause itself is unconscionable. *Taylor Bldg.* at ¶ 42.

Procedural unconscionability is determined by examining the circumstances present while the parties were bargaining for the contract. The court considers each party's age, education, intelligence, business experience, mental infirmities, ignorance, illiteracy, or inability to understand the language of the agreement. *Taylor* at ¶ 44; *Hayes* at ¶ 23. The record does not reflect that any of these conditions afflicted the parties while negotiating the contract at issue below. In fact, Linkous signed the contract, and his attorney signed the acknowledgment the same day. Linkous also had five business days after receiving the \$2000 to cancel the contract without a penalty. He was provided an opportunity to cancel the contract, but did not. *Compare Wisniewski v. Marek Builders*, 2017-Ohio-1035, 87 N.E.3d 696, ¶ 14 (8th Dist.).

In addition, Linkous's assignment of error addresses the underlying contract, not the arbitration clause. In Ohio,

R.C. 2711.01(A) refers to the arbitration *provision* in a contract, and

OHIO FIRST DISTRICT COURT OF APPEALS

notes that *it* is valid unless revocable under contract law. Because the arbitration clause is a separate entity, it only follows that an alleged failure of the contract in which it is contained does not affect the provision itself. It remains as the vehicle by which the legitimacy of the remainder of the contract is decided.

(Emphasis sic.) *ABM Farms, Inc. v. Woods*, 81 Ohio St.3d 498, 502, 692 N.E.2d 572 (1998).

Claims of unconscionability that relate to the contract generally, rather than the arbitration clause specifically, should be decided by the arbitrator. *Taylor Bldg.* at ¶ 42. The arbitration clause is not unconscionable. Accordingly, in the case numbered C-170276, we overrule Linkous's assignment of error and affirm the judgment of the trial court.

We further hold that the partial default judgment was not a final order. *See* R.C. 2505.02, Civ.R. 54(B). Accordingly, the cross-appeal in the case numbered C-170323 is dismissed.

Further, a certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27.

MOCK, P.J., ZAYAS and MILLER, JJ.

Enter upon the journal of the court on May 25, 2018

per order of the court _____.
Presiding Judge