IN THE COURT OF COMMON PLEAS
AUGLAIZE COUNTY, OHIO
CIVIL DIVISION

LINDA MEYER Plaintiffs	CASE NO: 2013-CV-192
vs.	JOURNAL ENTRY ORDERS DENYING MOTION
ISLAND GROUP PARTNERS, LLC, ET AL Defendant	TO COMPEL ARBITRATION

Plaintiff brings several causes of action against Defendant, Giardina Law Group, PLLC, and attorney Lawrence P. Giardina, both of Brooklyn, New York, and against its successors and assigns, The Davis Law Group, Attorney Brian J. Davis, and Island Group Partners, LLC.

It appears undisputed that Defendants, Giardina, solicited by direct mailing, the business of what is best described as "debt relief services" and Plaintiff received such a mailing at her home near Wapakoneta, Ohio. Plaintiff responded by mailing in some sort of card, and Giardina's agents called her and engaged in various communications with her by mail, telephone, facsimile transmission and eventually in person through a "consultant" who appears to have been an independent contractor who was hired by Giardina as its agent.

This agent, Wendy Baxter, "assisted" Plaintiff in executing various agreements with Giardina, and said that she had "checked them out" and that they seemed to be "legit" [legitimate], in recommending them to Plaintiff.

Defendants have filed their collective motion to compel arbitration, attempting to enforce Paragraph 17, found on Page 8 of the agreement that was signed by Plaintiff on November 23, 2010, and submitted to Giardina via fax transmission that date; and the same exact agreement that was signed on December 12, 2010, at the face-to-face meeting with the "consultant" at the McDonald's restaurant where they met.

The court notes that the Defendants, Giardina, never executed the contract and that there is nothing in the record to indicate that the said defendants ever accepted Plaintiff's offer. If effect, Plaintiff signed a form contract and gave it to the "consultant", but the Defendant lawyer and law firm

never entered into that agreement. Accordingly, the inquiry should end there, as there is no contract but instead is a "quasi-contract" for the services provided up to the point of rescission, and the inquiry should be limited to the damages claimed by either party pursuant to the implied contract which may exist. An arbitration agreement is never implied but must be specifically entered into between the parties, which in this case was never specifically entered into as Defendants Giardina apparently failed to execute the same prior to the time of rescission.

Nevertheless, the court will analyze the motion if there had been a specific contract entered into between the parties.

While there are several issues that may be addressed at some future point in arbitration or mediation of this case that are raised in the Plaintiff's memorandum in opposition to the motion to compel arbitration, most of them do not apply to the court's analysis of the matter now before the court.

While the Federal Trade Commission's provisions regulating Debt Relief Services under its Telemarketing Sales Rules, and while attorneys may be exempted from that rule IF they have not had interstate telephone communications with the client and IF they have met face-to-face with the client and explained the various debt relief services that they are providing, those matters are not now before the court directly. What ramifications might be raised by the violation of those FTC regulations are also not before the court at this time.

Instead, while Plaintiff raises several points in memorandum and testimony going to the unconscionable nature of the contract, the only matter before the court is whether the arbitration agreement is procedurally and substantively unconscionable. As pointed out by the case law cited by defense counsel, Ohio recognizes a strong public policy favoring arbitration, and all doubts should be resolved in favor of arbitration.

An arbitration agreement is enforceable unless grounds exist at law or in equity for revoking the agreement. Unconscionability is a ground for revocation of an arbitration agreement, and as set forth in *Lake Ridge Academy v. Carney*, (1993), 66 Ohio St. 3d 376, 383, "[u]nconscionability includes both an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." The party asserting Unconscionability must prove that the arbitration agreement is both procedurally and substantively unconscionable. *Hayes;Musser, Exr. v. The Oakridge Home.*

In the instant case, considering the circumstances surrounding the contracting parties bargaining, including the age, education, intelligence, business acumen and experience, considering who drafted the agreement, whether alterations were possible, and the availability of such services, the unique nature of such services, the court will look also at the relative positions of the parties, the knowledge of the attorney that the consumer in this case is unable reasonably to protect her interests by her inability to understand the language of the agreement, for example.

Both parties have stipulated that the latter agreement of December 12, 2010, is the controlling agreement, while also pointing out that the agreement which was delivered to the Plaintiff by the Giardina defendants is identical to that later agreement. While not having any explanation as to why there had to be a second agreement signed in December, and why there had to be a face-to-face meeting with a "consultant" hired for that purpose, the Court notes that the telemarketing rules for debt relief services do have some applicability to this transaction.

In the instant case, the court notes that, while educated as a registered nurse, Plaintiff demonstrated that she has little or no business acumen, that she had become mired in debt and that she had disclosed to Giardina her financial condition and her debts, and the contract that she was presented was given to her by her attorney who had never met her, who did not explain anything to her prior to her signing the agreement of November 23, 2010, as no one had met her prior to that time; that the agreement of December 12, 2010, was the result of the prior agreement that she had already signed in much the same way that a subsequent confession in a criminal case flows from an earlier non-Mirandized confession.

In the instant case, the arbitration clause is buried in paragraph 17 on page 8 of only one of a number of long documents, and Plaintiff demonstrated that she never understood the concept of arbitration nor this paragraph. Frankly, having gone to a hospital nursing school about 40 years ago, and then getting a Bachelor's in Nursing degree about three decades ago, does not overcome the obvious inability of this woman to make business decisions and understand terminology without the help of her lawyer—and perhaps not even then. The Court notes that Giardina's services were not going to be provided to Plaintiff without her signing the agreement, apparently in the presence of Giardina's "consultant."

The court finds that the forms are so complex, and the print so fine, and after considering all of the relevant factors (*see Taylor Bldg, 117 Ohio St.3d 352 and the Restatement of the Law 2d, Contracts, §208*), that the arbitration agreement is procedurally unconscionable.

In analyzing whether this contract, had it been entered into, was commercially reasonable, and hence, whether it is unconscionable, the court must consider a variety of factors. One factor which seems to be highlighted by the allegations in the instant case is what the standards in the industry are.

This case involves debt relief services being provided by an attorney through his law firm (even though the "contract" was apparently assigned to the Davis defendants and the Island Group Partners entity.) Therefore, in reviewing what the standard in the industry are, the Court takes judicial notice of the Federal Trade Commission's regulations and its rules under the Telemarketing Sales Rules and its specific provisions for debt relief services.

Attorneys are only exempt if they do not engage in interstate telemarketing (and there is some quantum of evidence herein that Giardina did engage is such interstate telemarketing, including the affidavit that it filed in support of its motion), and if they meet face-to-face with their customers <u>before</u> singing them up (and there is some quantum of proof herein that Plaintiff was sent forms and signed them prior to any face-to-face meeting, and that she <u>never</u> met with an attorney or anyone other than

Wendy who told her that she had not worked for these folks but had "checked them out" and that they were "legit" and some impression that she thought it would be okay since they were lawyers.)

It is advantageous for someone selling debt relief services to do so as a lawyer and a law firm, because if you jump through the right hoops, procedurally, lawyers are then exempt from some of the Federal Trade Commission rules. Since the contact by the attorney's "consultant" took place in Ohio, however, the Ohio rules of ethics are applicable. In determining that the standards in the industry are, Opinion 96-9 of the Board of Commissioners on Grievances and Discipline is instructive.

In the instant case, Plaintiff was seeking legal assistance. While she does not understand that hiring this law firm "is a debt relief agency" and that they "help people file for bankruptcy" as to whether all of the fine print terms amount to practicing law or not, as there is no evidence of her understanding all of those terms of the agreement, it is clear that she was hiring a law firm to help her with her creditors. It is also clear that the forms referred to her as a "client" (e.g.—"Client Creditor List") and that the fees were listed in Paragraph 28 as "Legal and other fees."

An attorney should not include language in his "engagement of the law firm" (Giardina Engagement Agreement) requiring a client to prospectively agree to arbitrate fee disputes, legal malpractice disputes, or professional ethical misconduct disputes.

Plaintiff's causes of action include several different causes of action, including negligence and breach of fiduciary duty, and therefore include issues that included legal malpractice and ethical disputes.

After a review of all of the circumstances in this case, the court finds that the arbitration clause is substantively unconscionable as proven by the Plaintiff by a quantum of evidence sufficient to warrant the court to DENY Defendants' motion to compel arbitration, and the same is hereby DENIED.

IT IS SO ORDERED.

TO THE CLERK:
This Journal Entry MAY be a final appealable order.
Copies to parties and attorneys in accordance with Civil Rule 58.

Judge Frederick D. Pepple

VOL 185 PAGE 2474