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DISTRICT III/IV

April 24, 2013

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You are hereby notified that the Court has entered the following opinion and order:

2012AP999 Yellow Book USA v. 1st Rate Mortgage Corporation
(L.C. # 2011CV1452)

Before Higginbotham, Blanchard and Kloppenburg, JJ.

William Thayse appeals an order for summary judgment in favor of Yellow Book USA in Yellow Book's action to recover on an advertising contract. Thayse contends that the advertising contract is unenforceable because it is a contract of adhesion and against public policy; that the language in the contract purporting to impose personal liability on Thayse is unenforceable because it was not conspicuous; and that there is a disputed issue of fact as to whether Thayse intended to bind himself personally by signing the advertising contract. Based

upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).[1] We summarily affirm.

This action arises from a Yellow Book advertising contract listing First Rate Mortgage Corporation as the advertising customer. Thayse, the president of First Rate Mortgage, signed the contract above the line stating "Authorized Signature Individually and for the Customer." Yellow Book sought to enforce the contract against Thayse in his individual capacity, and Thayse denied individual liability. The circuit court granted summary judgment to Yellow Book.

Summary judgment is properly granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2). Thayse argues that the circuit court erred by granting summary judgment to Yellow Book because, according to Thayse, Yellow Book is not entitled to judgment as a matter of law and there is a disputed issue of fact. We disagree.

First, Thayse contends that the advertising contract is unenforceable because it is a contract of adhesion and against public policy. We are not persuaded.

"[A] contract of adhesion is a 'standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.'" ***Wisconsin Auto Title Loans, Inc. v. Jones***, 2006 WI 53,

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶52, 290 Wis. 2d 514, 714 N.W.2d 155 (quoting another source). Contracts of adhesion are not necessarily unenforceable. *See* ***id.***, ¶53. However, a contract of adhesion is suspect under Wisconsin law, and will be against public policy and unenforceable if it is unconscionable. ***Id.***, ¶¶29, 53. A party challenging a contract as unconscionable must show that the contract is both procedurally and substantively unconscionable. ***Id.***, ¶29. "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." ***Id.***, ¶32. Whether a contract is unconscionable is a question of law that we review de novo. ***Id.***, ¶25.

Here, Thayse contends that the advertising contract is unenforceable because it was prepared entirely by Yellow Book and offered to Thayse on a take-it-or-leave-it basis. However, Thayse does not develop an argument as to why he lacked meaningful choice in entering into the contract or how the contract terms were unreasonably favorable to Yellow Book. We conclude that the facts cited by Thayse—that the contract was drafted by Yellow Book and offered to Thayse on a take-it-or-leave-it basis—are insufficient to show that the contract is unenforceable as against public policy. *See* ***id.***, ¶53.

Thayse also contends that imposing personal liability on Thayse via his signature on behalf of First Rate Mortgage is against public policy. He contends that a finding of personal liability in this case imposes liability on every employee acting for his or her employer. The problem with this argument, however, is that Yellow Book does not contend that Thayse is personally liable based on his signature on behalf of First Rate Mortgage; rather, it seeks to impose liability on Thayse personally based on Thayse having signed *both* on behalf of First Rate Mortgage *and* in his individual capacity. This distinction negates Thayse's argument that

personal liability was imposed based on his signing the contract on behalf of First Rate Mortgage.

Next, Thayse contends that the language imposing personal liability on Thayse was not conspicuous, and therefore the contract may not be enforced against Thayse personally. In support, Thayse cites ***Rainbow Country Rentals and Retail, Inc. v. Ameritech Publishing, Inc.***, 2005 WI 153, 286 Wis. 2d 170, 706 N.W.2d 95. Thayse argues that the ***Rainbow*** court's determination that language as to liquidated damages must be conspicuous to be enforceable supports a similar determination that language as to personal liability must be conspicuous to be enforceable.

We assume without deciding that the language as to personal liability had to be conspicuous in order to be enforceable. We conclude that the language here was conspicuous.

In ***Deminsky v. Arlington Plastics Machinery***, 2003 WI 15, ¶28, 259 Wis. 2d 587, 657 N.W.2d 411, the supreme court looked to the definition of "conspicuous" under the Uniform Commercial Code provisions. The UCC defines "conspicuous" as follows:

> "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. Whether a term is "conspicuous" or not is a decision for the court. 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 of a record or display 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) (2011-12).

Thayse asserts that the language in the contract as to personal liability was not conspicuous because it was not in capitals or in contrasting type, font, or color to the surrounding text. He argues that the BLACK'S LAW DICTIONARY definition of "conspicuous" is not limited to whether a reasonable person should have noticed the term. Black's Law Dictionary, however, defines "conspicuous" as "clearly visible or obvious," and states:

> Whether a printed clause is conspicuous as a matter of law usu. depends on the size and style of the typeface. Under the UCC, a term or clause is conspicuous if it is written in a way that a reasonable person against whom it is to operate ought to notice it.

BLACK'S LAW DICTIONARY 351 (9th ed. 2009). Under any of these definitions, the language as to personal liability is conspicuous.

The disputed provision reads: "THIS IS AN ADVERTISING CONTRACT BETWEEN YELLOW BOOK SALES AND DISTRIBUTION COMPANY, INC. OR YP TEL AND," followed by three printed lines. Under the first line, the contract states: "Print Customer Name," and is followed by the word "and." Then, under the second printed line, the contract states, in bold print: "**Authorized Signature Individually and for the Customer**," followed by a parenthetical which states: "Read Paragraph 15 on the reverse hereof," and then requests the signer's title. Paragraph 15 on the reverse side is titled, in bold: "**Authority; Persons Obligated; Signer Obligated**," and states that the person signing the contract assumes personal liability for the terms of the contract, jointly and severally with the advertising customer. Finally, under the third printed line, the contract states: "Print signer's name."

It is plain to see that the disputed provision is written in a way that is clearly visible and obvious, and a reasonable person ought to have noticed it and understood that the signer was accepting personal liability for the contract. The provision begins in all capitals, and informs the signer that the contract is between Yellow Book, on the one hand, and then provides two lines divided by the conjunctive "and." One line is for the customer's name, and the second is for a signature which the contract states in bold is "Individually and for the Customer." The signature line also contains a parenthetical clearly directing the signer to the paragraph on the back of the form explaining that the signer will be personally liable under the contract. We conclude that, as a matter of law, the personal liability language was conspicuous.

Lastly, Thayse contends that there is a disputed issue of fact as to whether he intended to sign the contract in his individual capacity. We disagree.

"When construing contracts that were freely entered into, our goal 'is to ascertain the true intentions of the parties as expressed by the contractual language.'" ***Town Bank v. City Real Estate Dev., LLC***, 2010 WI 134, ¶33, 330 Wis. 2d 340, 793 N.W.2d 476 (quoting another source). A contract is ambiguous only if "it is susceptible to more than one reasonable interpretation." ***Id.*** If the contract is unambiguous, we will not "look beyond the face of the contract and consider extrinsic evidence to resolve the parties' intent." ***Id.*** Rather, "our attempt to determine the parties' intent ends with the four corners of the contract, without consideration of extrinsic evidence." ***Id.*** (quoting another source).

Thayse contends that the fact that he printed the word "President" after his signature creates an issue of material fact as to whether he intended to sign only on behalf of First Rate Mortgage or also in his individual capacity. He argues that the document did not ask for his title,

and thus it was significant that he provided it. Contrary to Thayse's argument, however, the signature line does ask for the signer's title. Thus, we do not agree with Thayse that the fact that he provided his title indicated his intent to sign in his official capacity only. We conclude that the only reasonable interpretation of the personal liability language in the contract, set forth above, is that the individual signing the contract accepts personal liability under the terms of the contract. Thus, the question of intent ends with the language of the contract, which imposes liability on Thayse personally.

Therefore,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals