IN THE SUPREME COURT OF THE STATE OF NEVADA

COMMUNITY COUNSELING CENTER, A NEVADA CORPORATION,
Appellant,
vs.
LYON FINANCIAL SERVICES, INC., A CORPORATION, D/B/A BCL CAPITAL,
Respondent.

No. 38675

FILED

MAY 15 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

Community Counseling Center (Community) appeals the district court's order granting summary judgment in favor of Lyon Financial Services, Inc. (Lyon). Community entered into a contract with Skipco, Inc. to lease copy machines.[1] Provision J of the contract provides that Community agrees that if Skipco sells or assigns the contract "that the rights of the new owner will not be subject to any claims, defenses, or set offs that you may have against" Skipco. After the parties entered the contract, Skipco assigned the contract to Lyon. Community failed to make payments under the contract. Lyon filed a lawsuit. Thereafter, Lyon filed a motion for summary judgment. Lyon argued that the district court should grant summary judgment because Community's only defenses to paying under the contract were against Skipco. The district court granted Lyon's motion for summary judgment. Community appealed.

[1]Community calls the contract an installment contract, while Lyon calls the contract a lease. Hereinafter, this court refers to it as a contract.

03-08280

This court reviews summary judgment orders de novo.[2] Summary judgment is warranted when the record, viewed in a light most favorable to the non-moving party, indicates no triable issues of material fact and that the moving party is entitled to judgment as a matter of law.[3] On appeal, Community argues that the contract is unconscionable and that there were material issues of fact as to damages precluding summary judgment.[4]

When a contract is unambiguous, "it will be construed from the written language and enforced as written."[5] Here, the contract is unambiguous. In provision J of the contract, Community agreed that it would not assert defenses it had against Skipco against any assignee of the contract. Thus, this court must determine if provision J of the contract is unconscionable.

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[2]University of Nevada, Reno v. Stacey, 116 Nev. 428, 431, 997 P.2d 812, 814 (2000).

[3]NRCP 56(c); Auckenthaler v. Grundmeyer, 110 Nev. 682, 684, 877 P.2d 1039, 1040 (1994).

[4]Community makes other arguments, however, it raises them for the first time on appeal. Having failed to raise these arguments in the district court, we decline to consider them on appeal. See Vacation Village v. Hitachi America, 111 Nev. 1218, 1220, 901 P.2d 706, 707 (1995); Feldman v. State of Nevada, 96 Nev. 614, 618, 615 P.2d 238, 241 (1980); Central Bank v. Baldwin, 94 Nev. 581, 585, 583 P.2d 1087, 1090 (1978).

[5]Sandy Valley Assocs. v. Sky Ranch Estates, 117 Nev. 948, 953-54, 35 P.3d 964, 967 (2001).

This court has held that "[a] contract is unconscionable only when the clauses of [the] contract and the circumstances existing at the time of the execution of the contract are so one-sided as to oppress or unfairly surprise an innocent party."[6] Additionally, this court has held that generally the contract or provision must be both procedurally and substantively unconscionable in order for this court to exercise its discretion to decline to enforce the contract or provision.[7] The procedural element of unconscionability focuses on oppression or surprise due to unequal bargaining power.[8] The substantive element of unconscionability centers on harsh or one-sided results.[9]

In Community's opposition to Lyon's motion for summary judgment, it did not argue that it was the weaker party or offer any evidence to support such an argument.[10] Further, the record reflects that Skipco and Community are corporations and both relatively sophisticated

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[6]Bill Stremmel Motors v. IDS Leasing Corp., 89 Nev. 414, 418, 514 P.2d 654, 657 (1973).

[7]Burch v. Dist. Ct., 118 Nev. __, __, 49 P.3d 647, 650 (2000).

[8]Armendariz v. Foundation Health Psychcare, 6 P.3d 669, 690 (Cal. 2000), cited in Burch, 118 Nev. at __, 49 P.3d at 650 n.14.

[9]Id.

[10]Van Cleave v. Kietz-Mill Minit Mart, 97 Nev. 414, 415, 633 P.2d 1220, 1221 (1981) (holding that "[a] party opposing such a motion for summary judgment must set forth specific facts showing that there is a genuine issue for trial"). On appeal, Community contends that it is the weaker party because it is a nonprofit corporation. However, this argument is without merit.

business entities.[11] Also, Community was operating for eight years and had at least thirty employees when it entered the contract with Skipco. The record does not reflect any disparity in bargaining power between the contracting parties.

Additionally, the first page of the contract states that "[t]his agreement contains provisions set forth on the reverse side, all of which are made a part of this agreement." The reverse side contained provision J of the contract. Therefore, Community was put on notice by reading[12] and signing the first page of the contract that there were further provisions to which Community agreed to be bound on the reverse side of the contract. The contract is not procedurally unconscionable.

Provision J does not lead to harsh or one-sided results as Community can still file a lawsuit against Skipco. Provision J of the contract is not substantively unconscionable. Because the record does not reflect any disparity in the bargaining power of the parties, any surprise due to unequal bargaining power, or harsh or one-sided results, the contract is not unconscionable.

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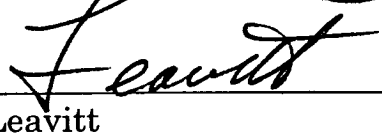
[11]See Complete Interiors, Inc. v. Behan, 558 So. 2d 48, 52 (Fla. Dist. Ct. App. 1990) (noting that in determining procedural unconscionability courts "consider the manner in which a particular contracting party's age, education, intelligence, financial position, business experience and other factors affected that party's bargaining position and whether such factors permitted the party to have a meaningful choice in the contract").

[12]Campanelli v. Altamira, 86 Nev. 838, 841, 477 P.2d 870, 872 (1970) (noting that generally when a party enters a contract it is bound by the terms of the contract even if the party did not read it).

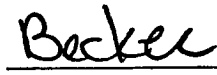
Although Community argues that issues of fact remain concerning damages, having reviewed the record, we conclude otherwise. Accordingly, we

ORDER the judgment of the district court granting summary judgment in favor of Lyon AFFIRMED.

_____, J.
Shearing



_____, J.
Leavitt



_____, J.
Becker

cc: Eighth Judicial District Court Department 12, District Judge
Pearson, Patton, Shea, Foley & Kurtz
Blalock & Associates
Clark County Clerk