

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

-----X
:
EUGENE J. LAKA, :
:
Plaintiff, :
:
-against- :
:
AFLAC NEW YORK and KENNETH MEIER, :
:
Defendants. :
:
-----X

Index No. 651809/2018
Motion Sequence No. 004
Hon. Justice Ostrager

**PLAINTIFF'S REPLY MEMORANDUM OF LAW IN FURTHER
SUPPORT OF HIS MOTION FOR LEAVE TO REARGUE**

Dimitry Joffe
JOFFE LAW P.C.
765 Amsterdam Avenue, 2C
New York, NY 10025
Tel: (917) 929-1964
Email: dimitry@joffe.law
Counsel for Plaintiff

September 6, 2018

Plaintiff's undersigned counsel regrettably informs the Court and the parties that Plaintiff Eugene Laka passed away on August 27, 2018, with his estate succeeding to his claims in this Action.

1. The Court in the July 27 Order "redlined" the parties' Arbitration Agreement.

There is no doubt that the Court's Order allowing Aflac to compel arbitration "on the express condition that Aflac pay all arbitration costs for both parties" modified the fee-splitting contractual provision of the Arbitration Agreement between the parties, which states in paragraph 10.2 that "each party shall pay all expenses and fees of its selected Party arbitrator."

The New York Court of Appeals in Salvano v. Merrill Lynch, Pierce, Fenner & Smith, 85 N.Y.2d 173, 182 (1995), rejected the argument that Merrill Lynch could be compelled to submit to expedited arbitration of disputes with former employees where the arbitration provision contained no provision for expedition (emphasis added throughout):

[I]n the absence of an established ground for setting aside a contractual provision, such as fraud, duress, coercion or unconscionability, a court must enforce the parties' arbitration agreement according to its terms. Supreme Court's order would have been proper only if the arbitration agreement itself – here the Constitution and Rules of the New York Stock Exchange – provided for expedited arbitration. . . . [A]rbitration agreements are contracts and must be interpreted under the accepted rules of contract law (see, *Matter of Cowen & Co. v Anderson*, 76 N.Y.2d 318;

Matter of American Ins. Co. [Messinger – Aetna Cas. & Sur. Co.], 43 N.Y.2d 184). The court's role is limited to interpretation and enforcement of the terms agreed to by the parties; **it does not include the rewriting of their contract** and the imposition of additional terms (see, *Matter of Astoria Med. Group [Health Ins. Plan]*, 11 N.Y.2d 128). To read into the NYSE Rules a provision authorizing compulsory expedited arbitration **would be to fundamentally modify the terms of the parties' contract** and force respondent to arbitrate in a manner contrary to the agreement to which it has assented (see, *Matter of Cowen, supra*, at 321-322; *Szuts v Dean Witter Reynolds*, 931 F.2d 830, 831-832 [11th Cir]).

In *Shankle v. BG Maintenance Mgt.*, 163 F.3d 1230 (10th Cir. 1999), the Tenth Circuit Court of Appeals applied the same principle to the fee-splitting provision:

Relying on *Cole*, Appellant argues we should "redline" the fee-splitting provision and compel arbitration. The arbitration agreement at issue in *Cole*, however, made no clear allocation of responsibility for payment of arbitrator's fees. *Cole*, 105 F.3d at 1485. Because the contract was unclear on that point, the court was able to interpret the contract in a way that made it lawful. *Id.* No such ambiguity exists in this case. **The Agreement clearly makes the employee responsible for one-half of the arbitrator's fees and we are not at liberty to interpret it otherwise.** See *Awbrey v. Pennzoil Co.*, 961 F.2d 928, 930 (10th Cir.1992) ("A court is without authority to alter or amend contract terms and provisions absent an ambiguity in the contract.").

In striking a burdensome filing fee requirement from the arbitration agreement in *Matter of Teleserve Sys. Inc. (MCI)*, 230 A.D.2d 585, 594 (4th Dep't 1997), the Court reasoned:

The practical effect of such an oppressive and burdensome fee is to bar arbitration of

petitioner's claims against MCI. The fee thus is against public policy, which favors and encourages arbitration as an alternative to litigation (see, Mobil Oil Indonesia v Asamera Oil, 43 N.Y.2d 276, 281-282, rearg denied 43 N.Y.2d 846; Matter of Weinrott [Carp], supra, at 199). Further, the onerous filing fee requirement renders the contractual remedy of arbitration so " 'gravely difficult and inconvenient'" as to be illusory (Mitsubishi Motors v Soler Chrysler-Plymouth, supra, at 632, quoting The Bremen v Zapata Off-Shore Co., 407 US 1, 18). We thus grant the petition in part, to the extent of striking the filing fee requirement from the agreements on the ground that it is unconscionable on its face and as a matter of law (cf., Spence v Omnibus Indus., 44 Cal App 3d 970, 119 Cal Rptr 171 [4th Dist] [holding \$720 arbitration filing fee unenforceable], cited with approval by Waggoner v Dallaire, 649 F.2d 1362, 1367 [9th Cir]).

Even though the filing fee in the MCI case was exceptionally high, the principle that the burdensome arbitration fee precluding plaintiffs from bringing claims is "unenforceable" as against public policy applies *a fortiori* in this case, where Aflac's fee provision had in fact deterred Plaintiff from pursuing his federal statutory claims until they had expired. See also Brower v. Gateway 2000, 246 A.D.2d 246, 254-55 (1st Dep't 1998) ("Excessive fees, such as those incurred under the ICC procedure, have been grounds for finding an arbitration provision unenforceable or commercially unreasonable").

Nevertheless, the Court in its Order "redlined" the Arbitration Agreement (over Plaintiff's objection) by

eliminating the unambiguous fee-splitting provision in favor of the judicially-created "condition that Aflac pay arbitration costs for both parties" and upheld the rest of the Agreement (despite the fact that the fee provision had already caused Plaintiff's loss of his federal statutory claims).

Plaintiff contends that this judicial reformation should be reconsidered because "redlining" is not an appropriate remedy in this case - it is a palliative. As shown below, the Order left the rest of the Arbitration Agreement tainted by numerous other unconscionable provisions, which together represent an "integrated scheme to contravene public policy," making severance or redlining inappropriate here.

2. Judicial reformation of the fee-splitting provision of the Arbitration Agreement does not remedy the Agreement's unconscionability.

By focusing on one unconscionable feature of the Arbitration Agreement, the Court may have overlooked that it ought to have considered "all facts and circumstances of a particular case," In re Estate of Friedman, 64 A.D.2d 70, 407 N.Y.S.2d 999, 1008 (2d Dep't 1978), with "**no set weight . . . given any one factor.**" State v. Wolowitz, 96 A.D.2d 47, 68 (2d Dep't 1983). See Brennan v. Bally Total Fitness, 198 F. Supp. 2d 377, 384 (S.D.N.Y. 2002) ("Judging the contract in light of 'all the facts and circumstances of [this] particular case' **as I must**, Friedman, 407 N.Y.S.2d at 1008, I conclude that the

agreement to arbitrate was unconscionable, and is therefore unenforceable. As a result, there was no agreement to arbitrate.").

The fee provision is not the only unconscionable feature of the Arbitration Agreement -- far from it. In particular, the Court should have considered the Agreement's procedural unconscionability due to high pressure tactics used by Aflac, the stronger negotiating party, denying Plaintiff any meaningful choice to consider, understand or negotiate the oppressive terms of the Agreement (or even to retain a copy of it after execution). See Sablosky v. Gordon Co., 73 N.Y.2d 133, 137 (N.Y. 1989) ("Such claims [of procedural unconscionability] are judged by whether the party seeking to enforce the contract has used **high pressure tactics** or deceptive language in the contract and whether there is inequality of bargaining power between the parties.").

The Court should have also considered the Agreement's substantive unconscionability due to a host of provisions unreasonably favoring that stronger party beyond the fee-allocation provision. See Moving Brief at pp. 2-3 (listing **five** substantively unconscionable features of the Agreement aside from the fee allocation provision).

As shown in Plaintiff's Moving brief, these features - including Plaintiff's one-sided obligation to arbitrate any

dispute with Aflac and its numerous affiliates; a one-sided limitation of Aflac's liabilities and the type of claims Plaintiff can bring; and a strict confidentiality provision giving Aflac clear and substantial advantage over its sales associates as a repeat arbitration player - unreasonably favor the stronger party, making the Agreement substantively unconscionable. See Brennan v. Bally Total Fitness, 198 F. Supp. 2d 377, 384 (S.D.N.Y. 2002) ("The EDRP is **substantively unconscionable because its terms unreasonably favor** Bally."); Sablosky, 73 N.Y.2d at 138 (the arbitration agreement is subject to invalidation pursuant to the doctrine of unconscionability whereby the "**courts consider whether one of more key terms are unreasonably favorable to one party**")¹; cf. Desiderio v. NASD, 191 F.3d 198, 207 (2d Cir. 1999) ("Form U-4 binds **both** parties to mandatory arbitration and may not be said to favor the stronger party unreasonably") (emphasis original).

Finally, "[w]hile determinations of unconscionability are ordinarily based on a conclusion that both the procedural and substantive components are present, there have been exceptional cases where a provision of the contract is so outrageous as to

¹ "Indeed, some courts have invalidated unilateral arbitration clauses for want of mutuality although their decisions might as well rest on the doctrine of unconscionability or public policy (see, e.g., Deutsch v. Long Is. Carpet Cleaning Co., 5 Misc.2d 684 [1st Dept. 1956], affd no opn. 3 A.D.2d 1002; Dwyer v. Biddle, 274 App. Div. 903; and see, Miner v. Walden, 101 Misc. 2d 814 (expressly finding clause unconscionable and against public policy))." Sablosky, 73 N.Y.2d at 138.

warrant holding it unenforceable on the ground of substantive unconscionability alone." Gillman v. Chase Manhattan Bank N.A., 73 N.Y.2d 1, 12 (1988); Brower, 246 A.D.2d at 254 ("While it is true that, under New York law, unconscionability is generally predicated on the presence of both the procedural and substantive elements, the substantive element alone may be sufficient to render the terms of the provision at issue unenforceable.").

3. The Court's acceptance of Aflac's fee waiver is contrary to the Second Circuit's waiver analysis in Ragone.

Plaintiff argued in the Moving Brief that the Court might have overlooked the Second Circuit's waiver analysis in Ragone v. Atlantic Video, 595 F.3d 115, 125 (2d Cir. 2010), which compels an invalidation of the Arbitration Agreement here despite Aflac's waiver of the fee-splitting provision.

Plaintiff's Moving brief demonstrates that Aflac's waiver in this case is contrary to the Ragone Court's reasoning for several reasons. See Moving Brief at pp. 6-9. And while the Second Circuit in Ragone did uphold the arbitration agreement as modified by the party's waivers of the statutes of limitation and fee-splitting provision, it did so with "less than robust enthusiasm," sounding a "Note of Caution" that the objections to such waivers are "far from insubstantial."

Remarkably, Defendants have simply chosen to ignore Ragone and its analysis of the not "insubstantial" waiver issues, and do not even attempt to refute any of Plaintiff's arguments that Aflac's waiver here is untenable under Ragone. But closing one's eyes to the argument does not make it go away, and Plaintiff respectfully submits that Plaintiff's unrefuted Ragone arguments, standing alone, warrant reconsideration of the Order.

4. Defendants' authorities do not compel a different conclusion.

As shown below (and to the extent not already addressed in Plaintiff's prior briefs), Defendants' authorities do not compel a different result. Thus, Defendants repeat their mantra that "mutuality of remedy is not required," citing Sablosky again, as if the Sablosky court did not state that the "***courts consider whether one of more key terms are unreasonably favorable to one party***" under the doctrine of unconscionability rather than the discredited doctrine of "mutuality of remedy," and further stated that "some courts have invalidated unilateral arbitration clauses for want of mutuality although their decisions might as well rest on the doctrine of unconscionability or public policy." 73 N.Y.2d at 138. See also Brennan, 198 F. Supp. 2d at 384 ("The EDRP is ***substantively unconscionable because its terms unreasonably favor Bally.***")

In Brady v. Williams Capital, 64 A.D.3d 127, 137 (1st Dep't 2009), the First Department stated that "the appropriate remedy is to sever the improper [fee-splitting] provision of the arbitration agreement, rather than void the entire agreement and force Brady to pursue her claim in state or federal court"). Here, the Agreement remains unconscionable after the severance (or "redlining") of the fee-splitting provision due to numerous other one-sided terms unreasonably favoring the stronger party.

In Brower, 246 A.D.2d at 254, the First Department actually "modif[ied] the order on appeal to the extent of finding that portion of the arbitration provision requiring arbitration before the ICC to be **unconscionable**" due to excessive fees.²

Cases cited by Defendants in support of their argument that high-pressure tactics coupled with a superior bargaining position does not amount to procedural unconscionability are factually distinguishable, see, e.g., Tarully v. Circuit City Stores, 333 F. Supp. 2d 151, 156-58 (S.D.N.Y. 2004) (no high pressure tactics alleged among four advanced bases for unconscionability); Marciano v. DCH Auto Group, 14 F. Supp. 3d 322, 333-34 (S.D.N.Y. 2014) (insufficient allegations of "high pressure tactics" where plaintiff was given "the opportunity to

² Defendants also rely on two recent cases in the Middle District of Georgia and Eastern District of New York, both of which are on appeal and neither of which provides any reasoned discussion of any of the issues raised here.

review and complete the entire employment application" and "was able to ask Fee to clarify at least some of the language on the signature page, and that Fee was responsive to this request"). Defendants also ignore that "the substantive element alone may be sufficient to render the terms of the provision at issue unenforceable," Brower, 246 A.D.2d at 254, and the Arbitration Agreement here is much more unconscionable in the substantive dimension than the agreements at issue in those cases.

Finally, in Stewart v. Paul, Hastings, Janofsky & Walker, 201 F. Supp. 2d 291 (S.D.N.Y. 2002), in marked contrast to the case at bar, it was "by no means . . . inevitable that plaintiff would be forced to pay any costs at all" under the challenged arbitration agreement, and "she was given an opportunity to consult with private legal counsel before [entering into agreement], and . . . she had availed herself of that opportunity to whatever extent she so wished" - the opportunity that the late Mr. Laka never had.

Respectfully Submitted,



September 6, 2018

Dimitry Joffe
JOFFE LAW P.C.
765 Amsterdam Avenue, 2C
New York, NY 10025
Tel: (917) 929-1964
Email: dimitry@joffe.law
Counsel to Plaintiff

CERTIFICATE OF SERVICE

I, Dimitry Joffe, hereby certify that on this 6th day of September 2018, I caused a copy of Plaintiff's Reply memorandum of law to be served electronically upon the registered participants in this case through the ECF system.



Dimitry Joffe
Counsel to Plaintiff