

Morrow v Nationwide Mut. Fire Ins. Co.

2015 NY Slip Op 32850(U)

January 29, 2015

Supreme Court, Nassau County

Docket Number: 601333/14

Judge: Timothy S. Driscoll

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ORIGINAL

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL

Justice Supreme Court

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**CAROLEE MORROW and THE GROW
INSURANCE AGENCY CORP.,**

Plaintiffs,

-against-

**NATIONWIDE MUTUAL FIRE INSURANCE
COMPANY, NATIONWIDE MUTUAL
INSURANCE COMPANY, NATIONWIDE
FINANCIAL GENERAL AGENCY, INC.,
KIMBERLY CARMICHAEL and JAMES
FUNARO,**

Defendants.

-----x

TRIAL/IAS PART: 14

NASSAU COUNTY

Index No: 601333/14

Motion Seq. No. 1

Submission Date: 12/8/14

Papers Read on this Motion:

- Notice of Motion.....X**
- Amended Notice of Motion, Affirmation in Support and Exhibits...x**
- Amended Complaint and Exhibits.....X**
- Memorandum of Law in Support.....X**
- Affidavit in Opposition and Exhibits.....X**
- Memorandum of Law in Opposition.....X**
- Reply in Support and Exhibits.....X**

This matter is before the court on the motion filed by Defendants Nationwide Mutual Fire Insurance Company ("NMFIC"), Nationwide Mutual Insurance Company ("NMIC"), Nationwide Financial General Agency, Inc. ("NFGA") (collectively "Nationwide"), Kimberly Carmichael ("Carmichael") and James Funaro ("Funaro") ("Defendants") on October 17, 2014 and submitted on December 8, 2014, following oral argument before the Court. For the reasons set forth below, the Court grants the motion and dismisses the Amended Complaint as asserted against all Defendants.

BACKGROUND

A. Relief Sought

Defendants move, pursuant to CPLR §§ 3211(a)(1) and (7), for an Order dismissing the Amended Complaint and/or granting a stay of the above-captioned action (“Instant Action”) pending arbitration.

Plaintiffs Carolee Morrow (“Morrow”) and The Grow Insurance Agency Corp. (“Grow”) (“Plaintiffs”) oppose the motion.

B. The Parties’ History

The Amended Complaint describes the Instant Action as one seeking a declaratory judgment and rescission of an owner-operator Nationwide Insurance franchise agreement as well as damages and restitution allegedly arising out of fraud and misrepresentation, fraud in the inducement and violation of New York’s Franchise Law (“Franchise Law”), together with any injunctive relief that the Court deems appropriate.

Morrow is a licensed insurance agent for Property, Casualty, Life, Accident and Health Insurance and is the sole owner of Grow. Carmichael is the Associate Vice President of Sales of one or more of the Defendant corporations and Funaro is affiliated with one or more of the Defendant corporations. Prior to March 31, 2013, Morrow was employed by the Bernich Agency, Inc. (“Bernich Agency”) whose principal agent and owner was John A. Bernich (“Bernich”). As an employee of the Bernich Agency and a licensed insurance salesperson, Morrow had built a substantial book of business for the Bernich Agency.

In 2003, the Bernich Agency had a substantial book of Nationwide Insurance business (“Nationwide Sales”). The Bernich Agency, on behalf of Nationwide, sold products requiring Series 6 and 63 licensing and registration with Financial Industry Regulatory Authority (“FINRA”) by applicable state and federal law. At some point in time, Nationwide stopped the Bernich Agency from selling products that required a Series 6 or 63 licensing or registration with FINRA. On or about April 1, 2013, and for some time prior thereto, the Bernich Agency had no Nationwide customers or products requiring Series 6 or 63 licensing or registration.

Several years prior to 2013, a Nationwide agent advised Morrow that the owner of the Bernich Agency was retiring and that Morrow would be able to acquire the Bernich Agency’s

Nationwide Sales effective April 1, 2013. Relying on that representation, Plaintiffs believed that they would acquire the Bernich Agency's brokerage business by April 1, 2013 and Plaintiffs continued to work for the Bernich Agency "for relatively nominal compensation" (Am. Compl. at ¶ 23). Thereafter, Morrow arranged for a new lease to the premises ("Premises") in Bethpage, New York where the Bernich Agency was located and arranged to be responsible for utilities and other expenses.

As of April 1, 2013, Plaintiffs serviced the Bernich Agency's Nationwide Insurance Sales as the owner of the agency's business. As Plaintiffs had no written agreement with Nationwide, however, Plaintiffs serviced the entire broker business from April 1, 2013 to June 30, 2013 through a different Nationwide agent known as the diMonda Agency, LLC which received payments for commissions from Nationwide and forwarded them to Plaintiffs. Those commissions were substantially less than what Plaintiffs would have received if the Bernich Agency had been provided to them. Plaintiffs allege that, between April 1 and June 14, 2013, they received numerous assurances that they would receive a new contract from Nationwide confirming their acquisition of Nationwide Insurance Sales of the Bernich Agency but never received a proposed contract.

Plaintiffs allege that on June 14, 2013, a proposed contract ("Agreement") (Ex. 1 to Am. Compl.) was sent to Morrow's personal email address, not to her Nationwide email address, and Morrow inadvertently deleted that email. On June 17, 2013, while speaking via telephone with a Nationwide representative, Morrow found that email and saw, for the first time, the Agreement which was titled "Nationwide Advantage Program Independent Contractor Exclusive Agent Master Agreement." Morrow was advised that she was required to sign the Agreement by June 18, 2013. Plaintiffs allege that the Agreement was insufficient because 1) it was illusory; 2) it was a contract of adhesion; 3) it contained factual misstatements; 4) although it stated that it constituted an agency appointment, it was in fact a franchise agreement that did not comply with the Franchise Law; and 5) the commission schedule provided for payments that were less than what the Bernich Agency received. Plaintiffs provide a list of the items that, they allege, demonstrate that the Agreement was an adhesion contract (Ex. 2 to Am. Compl.).

Plaintiffs allege that on or before October 2013, the Nationwide Defendants and Funaro devised a plan to take over Plaintiffs' Nationwide business and deliver that business to Funaro.

On several occasions in late 2013, Funaro inquired of Plaintiffs regarding the area in which the Premises was located. On February 18, 2014, Funaro advised Morrow that he was taking over the business at the Premises and taking over Plaintiffs' book of business. Plaintiffs allege that this conduct demonstrates that Defendants never intended for Plaintiffs to keep the agency but, rather, held the agency until Funaro was ready to take it over.

Pursuant to the Agreement, Morrow was required to obtain Series 6 and 63 licenses within six (6) months of execution of the Agreement. When Morrow failed to obtain those licenses within the required period, Nationwide advised her that the Agreement would be terminated. By letter dated February 18, 2014 (Ex. 5 to Am. Compl.), Nationwide advised Morrow that its agreement with Morrow was being canceled, in part due to Morrow's failure to pass the Series 6 and 63 examinations within 180 days of the Agreement's Effective Date. Plaintiffs allege that the true motivation for Nationwide's cancellation of the Agreement was to permit Nationwide to turn the insurance business over to Funaro. Plaintiffs allege that Series 6 and 63 licenses were not required to service the Nationwide Sales that Plaintiffs acquired by taking over the Nationwide Sales of the Bernich Agency. Nationwide's District Sales Manager subsequently advised Morrow that the Nationwide Sales that Morrow acquired from the Bernich Agency, along with the book of business that Morrow built, were being given to Funaro and his agency, and that Plaintiffs would not be compensated in connection with that transfer.

Section 35 of the Agreement, titled "All Controversies and Disputes Between the Parties Subject to Mandatory Binding Arbitration," provides, in pertinent part, as follows:

Without affecting Nationwide's rights under Section 30(E) of this Agreement [addressing forfeiture of agent separation payments], any controversy, claim or dispute between Agent and Nationwide, including, but not limited to, any claims arising out of or relating to any aspect of the parties' relationship, before, during or after the cancellation of the Agreement, whether based upon contract, tort, statute, fraud, misrepresentation or any other legal theory, shall be adjudicated by mandatory binding arbitration pursuant to the Arbitration Procedures for Nationwide Agents (the "Arbitration Procedures") and those Nationwide Arbitration Rules (the "Nationwide Arbitration Rules") set forth on Agent Gateway or such other place designated by Nationwide and accessible to Agent...

THE PARTIES UNDERSTAND THAT THEY ARE GIVING UP THE RIGHT TO: (A) PARTICIPATE IN ANY CLASS ACTION; AND (B) HAVE ANY CLAIM OR DISPUTE BETWEEN THEM DECIDED BY A COURT OR JURY.

Except as otherwise provided in this Agreement, this Section does not limit either party's right to pursue equitable remedies (including, without limitation, preliminary and permanent injunctive relief) from a court of competent jurisdiction before, after, or during the pendency of any arbitration, and the exercise of any such remedy does not waive either party's agreement to participate in arbitration. All claims by a party deemed not subject to arbitration may only be brought in a state or federal court located in Columbus (Franklin County), Ohio, and Agent hereby irrevocably consents to the personal jurisdiction of such courts and to the venue of any such court in Franklin County, Ohio.

The Amended Complaint contains seven (7) causes of action: 1) against Nationwide, for a declaratory judgment that the Agreement is an unenforceable and illusory contract, 2) against Nationwide, for a declaratory judgment that the arbitration provisions in the Agreement are unenforceable, 3) against Nationwide, for a declaratory judgment that the forum selection clause is unenforceable, 4) against Nationwide and Carmichael for fraud, 5) against Nationwide for a violation of state and federal franchise laws, 6) against Funaro based on the allegation that he attempted to acquire the Bernich Agency's Nationwide Insurance Sales even though he knew that Plaintiffs had an Agreement with Nationwide, and 7) against Nationwide and Carmichael for fraud.

In opposition to the motion, Morrow affirms that Defendants attempted to wrongfully remove the Instant Action to federal court when there was no basis to do so. Morrow provides a copy of the decision of United States District Judge Joseph F. Bianco dated September 16, 2014 in the matter titled *Carolee Morrow and The Grow Insurance Agency Corp. v. Nationwide Mutual Fire Insurance Company et al.*, which had been filed in the United States District Court, Eastern District of New York, Case No. 14-CV-2664 ("Federal Action"). In his decision ("Federal Decision"), Judge Bianco 1) granted plaintiffs' motion to remand the Federal Action to state court for lack of federal diversity jurisdiction; and 2) denied, as moot, defendants' motion to transfer or, in the alternative, stay or dismiss pending arbitration. The Federal Decision reflects that plaintiffs initially filed their action in the Supreme Court of New York, Nassau County and defendants removed the action on the basis of diversity jurisdiction on April 28, 2014.

Morrow submits that Defendants “are now seeking to deprive me of my day in court by forcing me into an arbitration that I cannot afford” (Morrow Aff. in Opp. at ¶ 5) and provides a copy of her net worth statement (Ex. B to Morrow Aff. in Opp.) and a letter from a bank denying her application for a loan (*id.* at Ex. C) in support. Morrow affirms that she cannot afford to arbitrate this matter and can only afford to litigate her claims in New York. She also affirms that her witnesses are in New York and that the relevant events took place in New York.

C. The Parties’ Positions

Defendants submit that, within the Agreement, Morrow entered into a binding arbitration agreement that requires her to arbitrate any claims that she may have against Nationwide. Defendants contend, further, that Plaintiffs’ claims clearly come within the scope of the broad arbitration clause in the Agreement. Moreover, the Agreement provides that it is governed by Ohio law and the Federal Arbitration Act which, like New York law, favor and encourage arbitration and compel the dismissal or staying of the Instant Action so that the parties can arbitrate their dispute.

Defendants contend, further, that the Court must dismiss the Instant Action pursuant to the forum selection clause in the Agreement. Defendants submit that the Complaint centers entirely on Morrow’s involvement in Nationwide’s Advantage Program and raises issues including, but not limited to, the enforceability of the Agreement and whether Defendants made fraudulent misrepresentations to Plaintiffs. Thus, the Agreement governs those claims and Plaintiffs are bound by the forum selection clause in the Agreement. Moreover, even if Plaintiffs’ claims were not subject to arbitration, Morrow expressly agreed that all claims by a party deemed not subject to arbitration may only be brought in state or federal court located in Ohio, and the Court should dismiss the Instant Action on that basis.

Defendants contend, further, that dismissal of the claims against Carmichael, an employee of Nationwide, and Funaro, an agent of Nationwide, is also appropriate. Carmichael and Funaro, although non-signatories to the Arbitration Agreement, may compel arbitration in light of their agency relationship to Nationwide and because their alleged liability, as set forth in the Amended Complaint, is based on the fact that they were agents of Nationwide. Defendants also argue that the Amended Complaint fails to state a claim against Carmichael or Funaro.

Plaintiffs oppose the motion submitting that Plaintiffs' causes of action are not subject to arbitration because 1) they relate to claims that arose before the Agreement was entered; 2) the claims involve acts by parties that are not parties to the Agreement; and 3) the causes of action for declaratory judgment are not subject to the arbitration provision because they are equitable remedies that are excluded from arbitration.

Plaintiffs also contend that the Agreement is unconscionable because Morrow "had no meaningful choice in negotiating the arbitration provision" (Ps' Memo. of Law in Opp. at p. 3). Plaintiffs suggest that it is unlikely that Nationwide had ever changed the terms of the arbitration provision for other contracting parties, or that Nationwide would have agreed to any change suggested by Morrow. They submit, further, that 1) Morrow had limited time to review and sign the Agreement; 2) there is no mutuality or consideration because Nationwide had the exclusive right to change the arbitration provision at any time, for any reason; and 3) the costs associated with the arbitration proceedings are exceedingly high. Under these circumstances, Plaintiffs contend, the arbitration provision is both procedurally and substantively unconscionable.

Plaintiffs also argue that the forum selection clause is unreasonable and will deprive Plaintiffs of their day in court. Plaintiffs note that Plaintiffs are residents of New York, Nationwide maintains offices in New York and regularly conducts business from its New York offices, and the parties and evidence are in New York. Under these circumstances, Plaintiffs contend, there is no rational basis for this litigation to take place in Ohio. Plaintiffs also submit that they have stated viable causes of action against Funaro and Carmichael.

In reply, Defendants dispute Plaintiffs' suggestion that the Agreement, or the arbitration provision contained therein, was unconscionable. Defendants submit that Morrow willingly entered into the Agreement, and has admitted as much. Morrow signed and initialed every page of the Agreement, which includes warranties that she was not under duress and had the opportunity to consult with counsel. Thus, Plaintiffs have failed to present any facts supporting their claims of unconscionability.

RULING OF THE COURT

A. Dismissal Standards

In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *Bivona v. Danna & Associates, P.C.*, 2014 N.Y. App. Div. LEXIS 8873, * 1-2 (2d Dept. 2014), quoting *Alva v. Gaines, Gruner, Ponzini & Novick, LLP*, 121 A.D.3d 724 (2d Dept. 2014) (internal quotation marks omitted) and citing *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

A motion to dismiss a cause of action pursuant to CPLR § 3211(a)(1) may be granted only if documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law. *Bivona v. Danna & Associates, P.C.*, 2014 N.Y. App. Div. LEXIS 8873 at * 2, citing *Indymac Venture, LLC v. Nagessar*, 121 A.D.3d 945 (2d Dept. 2014), quoting *Whitebox Concentrated Convertible Arbitrage Partners, L.P. v. Superior Well Servs., Inc.*, 20 N.Y.3d 59, 63 (2012).

A forum selection clause may, under certain circumstances, constitute documentary evidence sufficient to provide a proper basis for dismissal of a complaint pursuant to CPLR § 3211(a)(1), such as where the forum selection clause provides that any dispute arising under the relevant agreement must be litigated in the courts of a state other than New York. *Lowenbraun v. McKeon*, 98 A.D.3d 655, 656 (2d Dept. 2012), citing *Boss v. American Express Fin. Advisors, Inc.*, 6 N.Y.3d 242 (2006) and *Adler v. 20/20 Cos.*, 82 A.D.3d 918, 920 (2d Dept. 2011).

B. Forum Selection Clauses

Parties to a contract may freely select a forum which will resolve any disputes over the interpretation or performance of the contract. *Creative Mobile Technologies, LLC v. Smart Modular Technologies, Inc.*, 97 A.D.3d 626 (2d Dept. 2012), quoting *Brooke Group v. JCH Syndicate 488*, 87 N.Y.2d 530, 534 (1996). A contractual forum selection clause is prima facie valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court. *Creative Mobile Technologies, LLC v. Smart Modular*

Technologies, Inc., 97 A.D.3d at 626, quoting *LSPA Enter., Inc. v. Jani-King of N.Y., Inc.*, 31 A.D.3d 394, 395 (2d Dept. 2006).

A forum selection clause is mandatory when it grants exclusive jurisdiction to a particular forum or incorporates obligatory venue language. By contrast, a permissive forum selection clause only reflects the contracting parties' consent to resolve disputes in a certain forum, but does not require the resolution of disputes in that forum. *Giro, Inc. v. Malaysian Airline System Berhad*, 2011 U.S. Dist. LEXIS 59738, * 10 (S.D.N.Y. 2011) (citations omitted). In determining whether a forum selection clause is mandatory or permissive, the Court must consider the words of the clause in context to ascertain whether they simply make venue proper in a jurisdiction, or exclude venue in any other jurisdiction. *Id.* at * 11.

C. Arbitration

CPLR § 7501, titled "Effect of arbitration agreement" provides:

A written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award. In determining any matter arising under this article, the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute.

Generally, it is for the courts to make the initial determination whether a particular dispute is arbitrable, that is whether the parties have agreed to arbitrate the particular dispute. *Nationwide General Insurance Company v. Investors Insurance Company of America*, 37 N.Y.2d 91, 95 (1975) quoting *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 570-71 (1960). The ultimate disposition of the merits, however, is reserved for the arbitrator and the courts are expressly prohibited from considering whether the claim regarding which arbitration is sought is tenable, or otherwise passing on the merits of the dispute. *Nationwide General Insurance Company v. Investors Insurance Company of America*, 37 N.Y.2d at 75, citing CPLR § 7501.

With regard to the scope of an arbitration clause, a broad arbitration clause should be given the full effect of its wording in order to implement the intention of the parties. *Weinrott v. Carp*, 32 N.Y.2d 190 (1973). A court may exclude a substantive issue from issues that are submitted to an arbitrator only if the arbitration clause itself specifically enumerates the subjects intended to be put beyond the arbitrator's reach. *Silverman v. Benmor Coats, Inc.*, 61 N.Y.2d

299 (1984).

Arbitration is favored in New York State as a means of resolving disputes, and courts should interfere as little as possible with agreements to arbitrate. *Shah v. Monpat Construction*, 65 A.D.3d 541, 543 (2d Dept. 2009). The Court must determine whether parties have agreed to submit their disputes to arbitration and, if so, whether the disputes generally come within the scope of their arbitration agreement. *Sisters of Saint John the Baptist v. Geraghty*, 67 N.Y.2d 997, 999 (1986). The Court's inquiry ends, however, when the requisite relationship is established between the subject matter of the dispute and the subject matter of the underlying agreement to arbitrate. *Id.* The ultimate disposition of the merits is reserved for the arbitrator and the courts are expressly prohibited from considering whether the claim regarding which arbitration is sought is tenable, or otherwise passing on the merits of the dispute. *Nationwide General Insurance Company v. Investors Insurance Company of America*, 37 N.Y.2d at 95, citing CPLR § 7501.

Ohio's Arbitration Act provides as follows at R.C. Chapter 2711.01(A):

A provision in any written contract, except as provided in division (B) of this section [addressing real estate title or possession disputes], to settle by arbitration a controversy that subsequently arises out of the contract, or out of the refusal to perform the whole or any part of the contract, or any agreement in writing between two or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit, or arising after the agreement to submit, from a relationship then existing between them or that they simultaneously create, shall be valid, irrevocable, and enforceable, except upon grounds that exist at law or in equity for the revocation of any contract.

Arbitration is a favored method of dispute resolution in the law. *Central Accounting Systems, Inc. v. Comprehensive Post Acute Network, Ltd.*, 2014 Ohio App. LEXIS 4946, **4 (Ohio Ct. App., Butler County 2014), citing *Williams v. Aetna Fin. Co.*, 83 Ohio St. 3d 464, 471 (1998), *cert. den.*, 526 U.S. 1051 (1999). The strong public policy in favor of arbitration is codified in Ohio's Arbitration Act, which requires a court to stay an action if it involves an issue subject to an arbitration agreement. *Central Accounting Systems, Inc. v. Comprehensive Post Acute Network, Ltd.*, 2014 Ohio App. LEXIS 4946 at **4, citing R.C. 2711.01(A). Where there are doubts regarding the application of an arbitration clause, such doubts should be construed in favor of arbitrability. *Central Accounting Systems, Inc. v. Comprehensive Post Acute Network*,

Ltd., 2014 Ohio App. LEXIS 4946 at ** 4, citing *Council of Smaller Enterprises v. Gates, McDonald & Co.*, 80 Ohio St. 3d 661, 666 (1998).

The Federal Arbitration Act (“FAA”) creates a body of federal substantive law establishing and governing the duty to honor agreements to arbitrate disputes. *Variblend Dual Dispensing Systems, LLC v. Seidel GmbH & Co., KG*, 970 F. Supp. 2d 157, 162 (S.D.N.Y. 2013), citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985), quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

Although nonsignatories cannot ordinarily compel arbitration, where there is an agency relationship between a signatory and a nonsignatory, the nonsignatory may compel arbitration. *Bowie v. Clear Your Debt, LLC*, 523 Fed. Appx. 315, 317 (6th Cir. 2013). In *Bowie v. Clear Your Debt, LLC*, the Sixth Circuit held that, because plaintiff’s complaint appeared to base the liability of an individual defendant on the fact that he was the signatory company’s agent, that individual defendant could compel arbitration. *Id.* The Sixth Circuit also held that a signatory is estopped from avoiding arbitration with the nonsignatory where the nonsignatory’s claims are intertwined with the underlying contract. *Id.* In light of the fact that the plaintiff’s claims against the individual defendants were intertwined with the underlying contract containing the arbitration clause, the District Court had the discretion to compel arbitration on those claims. *Id.*

D. Unconscionability

To defeat a motion for stay brought pursuant to R.C. 2711.02, a party must demonstrate that the arbitration provision itself in the contract at issue, and not merely the contract in general, was fraudulently induced. *ABM Farms, Inc. v. Woods*, 81 Ohio St. 3d 498, 502 (1998), citing *Krafcik v. USA Energy Consultants Inc.*, 107 Ohio App. 3d 59, 63 (1995). A claim of fraud in the inducement arises when a party is induced to enter into an agreement through fraud or misrepresentation. *ABM Farms, Inc. v. Woods*, 81 Ohio St. 3d at 502. To prove fraud in the inducement, a plaintiff must prove that the defendant made a knowing, material misrepresentation with the intent of inducing the plaintiff’s reliance, and that the plaintiff relied on that misrepresentation to her detriment. *Id.*, citing *Beer v. Griffith*, 61 Ohio St. 2d 119, 123 (1980). In *ABM Farms, Inc. v. Woods*, the Ohio court concluded that there was no evidence of fraudulent inducement of the arbitration provision, noting *inter alia* that there was no evidence presented to the trial court that plaintiff had discussed arbitration with defendant, “much less that

he made a misrepresentation about it.” 81 Ohio St. 3d at 502.

Procedural unconscionability involves the circumstances surrounding the execution of the contract between the two parties and occurs where no voluntary meeting of the minds was possible. *Hedeen v. Autos Direct Online, Inc.*, 19 N.E.3d 957, 965 (Ohio Ct. App., Cuyahoga County 2014), citing *Taylor Bldg. Corp. of Am. v. Benfield*, 117 Ohio St. 3d 352 (2008). In determining procedural unconscionability, a court should consider factors bearing on the relative bargaining position of the contracting parties, including age, education, intelligence, business acumen, experience in similar transactions, whether the terms were explained to the weaker party, and who drafted the contract. *Hedeen v. Autos Direct Online, Inc.*, 19 N.E.3d at 965, citing *McCaskey v. Sanford-Brown College*, 8th Dist. Cuyahoga No. 97261, 2012-Ohio-1543, ¶ 24, quoting *Taylor Bldg. Corp. of Am. v. Benfield* at ¶ 44.

Substantive unconscionability goes to the specific terms of the contract. *Hedeen v. Autos Direct Online, Inc.*, 19 N.E.3d at 965, citing *McCaskey v. Sanford-Brown College*, 8th Dist. Cuyahoga No. 97261, 2012-Ohio-1543 at ¶ 30. When considering substantive unconscionability, the court should observe whether the terms of the contract are commercially reasonable which involves the consideration of factors including the fairness of the terms, the charge for the service rendered, the standard in the industry and the ability to accurately predict the extent of future liability. *Hedeen v. Autos Direct Online, Inc.*, 19 N.E.3d at 965-966 (internal quotations omitted).

E. Application of these Principles to the Instant Action

The Court dismisses the Amended Complaint as asserted against all Defendants. The Court concludes that the arbitration provision in the Agreement is valid, and that Defendants Carmichael and Funaro, as agents of Nationwide, may enforce the arbitration against Plaintiffs because Plaintiffs’ claims against Carmichael and Funaro appear to be based on the fact that they was Nationwide’s agents, and are intertwined with the underlying Agreement. Moreover, Plaintiffs’ claims, as set forth in the Amended Complaint, clearly come within the purview of the broad arbitration provision in the Agreement. In addition, the Court rejects Plaintiffs’ claims of unconscionability. Morrow, as she herself alleges in the Amended Complaint, is an experienced agent who built a substantial book of business for the Bernich Agency. Morrow signed the Agreement and initialed every page. Moreover, there is no allegation that Morrow discussed a

revision of the arbitration provision with Nationwide, or that she lacked the ability to review and understand the Agreement, including its arbitration provision. Under these circumstances, there is no basis to conclude that the Agreement and, more specifically, the arbitration provision therein, is unenforceable.

The Court also concludes that the forum selection clause is enforceable, and compels the adjudication of any non-arbitrable claims in Ohio. The Agreement provides that all claims by a party deemed not subject to arbitration may only be brought in a state or federal court located in Columbus (Franklin County), Ohio, and further states that Morrow “irrevocably consents” to the personal jurisdiction of such courts and to the venue of any such court in Franklin County, Ohio. The Court concludes that this forum selection clause is mandatory because it grants exclusive jurisdiction to a particular forum and incorporates obligatory venue language. The Court rejects Plaintiffs’ contention that the Court should not enforce the forum selection clause. Plaintiffs have not shown the forum selection clause to be unreasonable, unjust, in contravention of public policy, or invalid due to fraud or overreaching, or demonstrated that a trial in the selected forum would be so gravely difficult that Plaintiffs would effectively be deprived of their day in court. Thus, to the extent that Plaintiffs’ declaratory judgment causes of action against Nationwide are not arbitrable, they must be asserted in an Ohio court, pursuant to the forum selection clause.

All matters not decided herein are hereby denied.

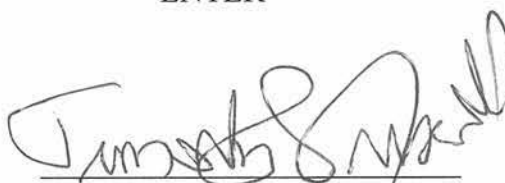
This constitutes the decision and order of the Court.

The Amended Complaint is dismissed.

ENTER

DATED: Mineola, NY

January 29, 2015



HON. TIMOTHY S. DRISCOLL

J.S.C.



ENTERED

FEB 10 2015

NASSAU COUNTY
COUNTY CLERK'S OFFICE