Frog Creek v. Vance Brown

Court of Appeal of California, First Appellate District, Division Five
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FROG CREEK PARTNERS, LLC, Plaintiff and Respondent, v. VANCE BROWN, INC., Defendant and Appellant.

Prior History: **[*1]** San Mateo County Super. Ct. No. CIV 445004.

Core Terms

arbitration, arbitration clause, unconscionable, trial court, compel arbitration, renew a motion, arbitration agreement, oppression, agreement to arbitrate, unenforceable, diligence, first amended complaint, dispute resolution, assent, binding, procedural unconscionability, negotiated, mutual

Judges: NEEDHAM, J.; JONES, P.J., GEMELLO, J. concurred.

Opinion by: NEEDHAM

Opinion

Defendant and appellant Vance Brown, Inc. (Brown) appeals from an order denying its renewed motion to compel arbitration of the claims brought against it by plaintiff and respondent Frog Creek Partners, LLC (Frog Creek). We conclude that Brown carried its burden of proving the existence of a written arbitration agreement, and reject Frog Creek's argument that the arbitration clause was unconscionable. Accordingly, we reverse the order denying the motion to compel arbitration.

FACTS AND PROCEDURAL HISTORY

This appeal arises out of the construction of a $ 13 million dollar residential complex on Bridle Lane in Woodside. This complex is intended to be a home for Jeffrey Drazan, the managing director of a venture capital firm, Sierra Ventures. Drazan formed his own limited liability company, respondent Frog Creek to manage the construction project.

Frog Creek selected a licensed contractor, appellant Brown, to build the Bridle Lane project. Gary Moiseff was assigned by Brown to be one of the project managers and he was primarily involved in the negotiation of the construction contract. Moiseff **[*2]** is not an attorney and no attorney was involved in the negotiations on Brown's behalf.

Work began on the Bridle Lane project on September 18, 2002, before any written contract had been executed by the parties. On September 20, Brown presented Frog Creek with a draft of a contract that included a dispute resolution provision requiring mediation of all disputes followed, if necessary, by arbitration of all disputes involving $ 50,000 or less. On September 24, attorney Norman McKay, counsel for Frog Creek, responded with a five-page letter suggesting various changes to the contract, including elimination of the $ 50,000 cap on disputes subject to arbitration.

The suggested change to the dispute resolution provision was made by Brown in a subsequent draft of the contract. A number of drafts passed back and forth between the parties, and Brown made several other changes at Frog Creek's request. Frog Creek was given a typewritten version of the contract and made a number of handwritten notations and changes, none of which affected the dispute resolution provision. Drazan signed this version of the agreement on behalf of Frog Creek in late 2002. He was not represented by counsel at the time.

Brown's **[*3]** president signed a ″clean″ version of the typewritten agreement on its behalf that did not contain the handwritten changes that had been made to Frog Creek's version. There is no single contract containing signatures of representatives of both parties, nor have they presented separate but identical signed versions of the contract. The dispute resolution and arbitration provisions

in each version of the agreement are identical. [1]

Frog Creek filed this suit against Brown seeking damages for breach of contract, conversion and other causes of action arising out of the construction project. The first amended complaint alleged in relevant part, ″In December 2002, Frog Creek and [Brown] entered into a written Construction Agreement (the 'Agreement') under **[*5]** which [Brown] agreed to construct certain improvements at the Real Property.″ It further alleged, ″In or about December 2002, Frog Creek and [Brown] entered into the Agreement which was entitled, 'Construction Agreement for the Residence at 3 Bridle Lane Woodside, California'. . . . A true and correct copy of the Agreement is attached hereto as **Exhibit A** and made a part hereof.″ The Frog Creek version with the handwritten notations was attached to the first amended complaint as Exhibit A.

Frog Creek unsuccessfully attempted to resolve the case through mediation. Brown then filed a motion to compel arbitration, attaching the two pages of the typewritten contract that specifically addressed arbitration. Ultimately, Brown produced its own version of the entire contract in support of its motion, i.e., the version that was signed only by a Brown representative and did not contain Frog Creek's interlineations. The trial court denied the motion to compel, finding there was no written agreement to arbitrate.

Brown appealed the denial of the motion to compel and this court affirmed in an unpublished decision filed July 12, 2006. (*Frog Creek Partners, LLC v. Vance Brown, Inc.*, (July 12, 2006, **[*6]** A111059) [nonpub. opn.].) We reasoned that Brown's motion was based on the arbitration clause contained in its own version of the contract, which Frog Creek had never signed and to which no mutual assent could be found. We specifically noted that we took no position on whether Frog Creek's version of the agreement was a binding contract or whether the parties were required to arbitrate under that version of the agreement. (*Ibid.*)

Following the issuance of our opinion in the first appeal, Brown filed a renewed motion to compel arbitration based on the Frog Creek version of the agreement, which it asserted was ″the controlling agreement″ between the parties regarding the construction of the Bridle Lane project. [2] Frog Creek opposed the motion, arguing that it was not properly before the court because there had been no changed circumstances as required by *Code of Civil Procedure section 1008*, that there was no valid agreement to arbitrate, and that if an arbitration agreement existed, it was unconscionable. The court denied the motion, stating in its written ruling that there was no written agreement to arbitrate and that the circumstances surrounding the signing of the contract supported **[*7]** a finding of oppression. Brown appeals.

DISCUSSION

Brown contends the trial court erred when it denied the renewed motion to compel arbitration because (1) the moving papers adequately established the existence of an arbitration agreement, and the arbitrator, not the court, should have ruled on other issues affecting its validity; (2) the trial court erroneously concluded there was no agreement to arbitrate when Frog Creek's first amended complaint and appellant's renewed motion to compel showed that both parties asserted the Frog Creek agreement was controlling; and (3) the arbitration clause was not otherwise unenforceable.

Frog Creek responds that (1) the renewed motion was properly denied **[*8]** because it was not based on new facts, new law or any change in circumstances, as required by *Code of Civil Procedure* [3] ~~section 1008~~; (2) the court properly determined there was no agreement be-

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[1] The dispute resolution provision states in pertinent part:

″**25.4** If the dispute is not resolved within thirty (30) days after the conclusion of the mediation then the dispute shall be resolved in an arbitration to be conducted in accordance with the terms of **Paragraph 25.5**, below.

″**25.5** If the dispute is to be the subject of an arbitration, either party may, at its own option, initiate the arbitration by delivering written notice to the other party to the dispute. All parties to the dispute shall attend and participate in, and shall be bound by the results of, the arbitration proceeding. The arbitration shall be conducted in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then in effect, as supplemented by **[*4]** the terms of this paragraph. During the pendency of any arbitration proceeding, the parties shall continue to perform all obligations under this Agreement. All arbitration proceedings shall be held in San Francisco, California, before a single neutral arbitrator having at least 10 years of relevant experience in design and construction matters. The arbitrator will be selected from a list of potential arbitrators provided by the American Arbitration Association. Each party shall make all of its project documents available for the other party to inspect and copy at least ten (10) days in advance of the arbitration. No other discovery will be permitted in connection with the arbitration. The arbitrator's award shall be in writing, and shall contain conclusion[s] of law and finding[s] of fact. Judgment upon the award may be entered in any court having jurisdiction.″

[2] In the points and authorities supporting Brown's renewed motion to compel, Brown purported to ″stipulate″ that the Frog Creek version of the agreement is controlling. In response, Frog Creek's opposition stated, ″This stipulation is probably not necessary because the Court of Appeal ruled that it had 'concluded that [Brown's] version of the agreement did not constitute a contract'. . . . Nonetheless, Frog Creek accepts [Brown's] stipulation, and will proceed with this dispute in reliance upon it.″

[3] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

tween the parties to arbitrate their claims; (3) Frog Creek is not estopped from denying the existence of an arbitration agreement; and (4) the court properly determined that if an agreement to arbitrate existed, it was unenforceable because it was unconscionable.

I. Showing Necessary for Renewed Motion Under *Section 1008*

As a threshold matter, we consider whether Brown's renewed motion to compel arbitration met the procedural requirements of *section 1008, subdivision (b)*, which provides, ″A party who originally made an application for an order which was refused in whole or in part . . . may make a subsequent application for the same order upon new or different facts, circumstances, or law, in which case it shall be shown by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown. **[*9]** . . .″

When interpreting the companion provision for motions for reconsideration contained in *section 1008, subdivision (a)*, courts have held that a moving party can rely on ″new or different facts, circumstances, or law″ only if it presents ″a satisfactory explanation for [having] fail[ed] to provide the evidence earlier, which can only be described as a strict requirement of diligence.″ (*Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 688-690.) Frog Creek argues, as it did in the trial court, that this diligence requirement logically extends to renewed motions under subdivision (b), and that it was not satisfied by Brown's second motion to compel arbitration because it was not based on any facts or circumstances that were unknown at the time the original motion was filed.

In his affidavit supporting the renewed motion to compel arbitration, counsel for Brown explained that it was based on different facts and circumstances because arbitration now was sought under Frog Creek's version of the contract, rather than Brown's version of the contract. Counsel noted that since the original motion to compel arbitration was filed, this court had issued an opinion affirming the denial of that motion **[*10]** and holding that the Brown version did not constitute a valid agreement. Our opinion specifically left open the possibility that the Frog Creek version might be found to be a binding written contract, and on this basis, Brown now agrees that the Frog Creek version of the agreement is the operative contract and seeks enforcement of its arbitration clause.

Ordinarily, the issue of changed circumstances and diligence under *section 1008* is commended to the trial court's discretion and is reviewed for an abuse of that discretion. (See *Graham v. Hansen* (1982) 128 Cal.App.3d 965, 971.) Here the trial court's written order did not address the issue, but we conclude that as a matter of law, the intervening appellate opinion was a changed circumstance that justified bringing a renewed motion. (See *Gilberd v. AC Transit* (1995) 32 Cal.App.4th 1494, 1500, fn. 2.)

Although the Frog Creek contract was available to Brown at the time of the original motion to compel arbitration, Brown initially took the position that the agreement it had executed (which contained an arbitration clause identical to the Frog Creek version) was a binding agreement. This position turned out to be wrong, but there is no showing **[*11]** it was frivolous or was taken in bad faith, given the unusual circumstances in which the two versions of the agreement were executed. Our decision holding that the Brown version of the agreement was unenforceable rendered untenable Brown's initial position and made it appropriate to instead seek arbitration under the contract that both parties (now) agree is binding.

Frog Creek argues that notwithstanding the trial court's failure to address the diligence issue in its order, we must presume it found a lack of diligence and affirm that finding so long as it is supported by substantial evidence. (See *Fladeboe v. American Isuzu Motors, Inc.* (2007) 150 Cal.App.4th 42, 58-59.) We disagree. When a court issues a statement of decision that is silent as to certain points raised by the parties, and no objection is made to that omission, the doctrine of implied findings requires us to presume on appeal that the trial court made the factual determinations necessary to support the judgment. (§ 634; *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1133; see also *Ermoian v. Desert Hospital* (2007) 152 Cal.App.4th 475, 515.) This doctrine does not operate in Frog Creek's favor because the facts necessary **[*12]** to support the court's order do not necessarily include Brown's lack of diligence. To the contrary, the court's order focused entirely on whether there was a written arbitration agreement, rather than on the potentially dispositive diligence issue. If the court had determined the motion was procedurally barred under *section 1008* for a lack of diligence, it presumably would not have reached the merits, or would have done so only as an alternative basis for its ruling. In any event, the doctrine of implied findings requires us to uphold only those determinations supported by substantial evidence, and as we have discussed, our opinion in the appeal from the original motion to compel arbitration is a changed circumstance that justified the renewed motion as a matter of law. We therefore consider the court's ruling on its merits.

II. Existence of Arbitration Clause

Brown argues that the trial court erroneously determined there was no arbitration agreement because the parties had not mutually assented to such. In light of allegations made by Frog Creek in its pleadings, we agree with Brown that the parties must be deemed to have assented to the arbitration clause contained in section 25 of **[*13]** Frog Creek's version of the agreement.

In ruling on a motion to compel arbitration, the court's first task is to determine whether a written agreement to arbitrate exists. (§ 1281.2; *Gatton v. T-Mobile USA, Inc.* (2007) 152 Cal.App.4th 571, 579 (*Gatton*).) The party seeking arbitration bears the burden of proving the existence of an arbitration agreement and the opposing party bears the burden of proving any facts necessary to its defense. (*Gatton*, at p. 579.) Though the contract at issue involves interstate commerce, and is thus subject to the substantive provisions of the Federal Arbitration Act (FAA) (*9 U.S.C. § 1, et seq.*), we apply state law to determine the existence of the arbitration clause. (*Turtle Ridge Media Group, Inc. v. Pacific Bell Directory* (2006) 140 Cal.App.4th 828, 832; *Metalclad Corp. v. Ventana Environmental Organizational Partnership* (2003) 109 Cal.App.4th 1705, 1712.)

In its written order, the trial court concluded there was no agreement to arbitrate because no version of the agreement was signed by both parties before litigation commenced. The court reasoned that at the time of the first motion to compel, Frog Creek opposed the arbitration of claims. Thus, when **[*14]** Brown "executed" the Frog Creek agreement after losing the first motion, it was clear that Frog Creek did not agree to the arbitration cause and had effectively revoked its "offer" on that provision.

This analysis is flawed because it ignores the effect of Frog Creek's own pleadings in this case. The verified first amended complaint alleges that the parties "entered into a written Construction Agreement" in December 2002, and incorporates the Frog Creek version of the agreement by reference. An admission of fact in a pleading conclusively binds the pleader, and the pleader cannot offer contrary evidence unless permitted to amend. (*Castillo v. Barrera* (2007) 146 Cal.App.4th 1317, 1324; *Valerio v. Andrew Youngquist Construction* (2002) 103 Cal.App.4th 1264, 1272.) By alleging in its complaint that the parties agreed to its version of the contract in 2002, Frog Creek admitted that there was mutual assent to that agreement and that a contract was formed at that time. It is therefore estopped from disputing the existence of the agreement. (*Knoell v. Petrovich* (1999) 76 Cal.App.4th 164, 168-169; 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 413 et seq.) There is no basis in this record **[*15]** for differentiating between the contract as a whole and the arbitration clause for purposes of ascertaining the parties' mutual assent. In admitting that the parties entered into that contract, Frog Creek admitted they had agreed to the arbitration clause it contained. [4]

The trial court thus erred in concluding that there was no assent to the arbitration clause on the theory that the parties did not enter into a contract until after Frog Creek filed suit and withdrew any consent to arbitration. While Brown did not acknowledge the binding nature of the Frog Creek agreement until this suit was filed and the trial court had denied the first motion to compel, it did not purport to "execute" that agreement for the first time. Rather, it conceded that the Frog Creek version of the agreement-alleged by Frog Creek to have been executed by the parties in 2002-was operative. The allegations of the first amended complaint required the court to treat the Frog Creek agreement as having been the contract **[*16]** between the parties since 2002-implicit in which is the conclusion that the parties agreed to arbitration in 2002. (Contrast *Sandvik AB v. Advent Inern. Corp.* (3rd Cir. 2000) 220 F.3d 99, 109 [subsequent offer to resolve dispute in arbitration would not be effective if contract containing arbitration clause never came into existence].)

The first amended complaint does state that the arbitration clause is "unenforceable under applicable law." But this allegation, if true, would not negate the existence of the arbitration clause, the parties' assent to its terms, or the formation of the contract generally. Frog Creek was, and is, entitled to argue that the arbitration clause is unenforceable on grounds such as unconscionability, because such an argument can be made without contradicting the allegations in its first amended complaint. But it cannot defend against arbitration by arguing that the contract was unsigned by Brown at the time Frog Creek filed suit when it has alleged in its own pleadings that the parties entered into the contract containing the arbitration clause Brown seeks to enforce. In light of Frog Creek's judicial admissions, the trial court erred when it determined that **[*17]** the lack of a mutually executed written contract meant the parties had not agreed to arbitrate.

III. Unconscionability of Arbitration Clause

An arbitration agreement in a contract involving interstate commerce is subject to any state law defenses, including unconscionability, to the extent such defenses are applicable to all contracts. (*McManus v. CIBC World Markets Corp.* (2003) 109 Cal.App.4th 76, 92.) Procedural unconscionability involves the manner in which the arbitration clause was negotiated and the circumstances of the parties at that time, the relevant factors being oppression and surprise. (*Abramson v. Juniper Networks, Inc.* (2004) 115 Cal.App.4th 638, 656.) " 'The oppression component arises from an inequality of bargaining power of the parties to the contract and an absence of real negotiation or a meaningful choice on the part of the weaker party.' [Citation.]" (*Morris v. Redwood Empire Bancorp* (2005) 128 Cal.App.4th 1305, 1319 (*Morris*).) " ' "Substantive unconscionability" focuses on the terms of the agreement and whether they are "so one-sided as to

[4] Brown couches the issue primarily as one involving estoppel, but the factual allegations in Frog Creek's first amended complaint fall more aptly under the related doctrine of judicial admissions

'shock the conscience.' ″ [Citations.]' [Citations.]″ (*Abramson*, at p. 656.)

Frog Creek argues, as it did in the trial court, **[*18]** that the arbitration clause in its version of the agreement was unenforceable because it was unconscionable. Brown responds that an arbitrator appointed under the agreement, rather than the court, should rule on this unconscionability claim.

The procedure for seeking arbitration in state court is governed by the Code of Civil Procedure, even when the contract involves interstate commerce. (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 409-410.) Section 1281.2 provides in relevant part, ″On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that: [P] . . . [P] (b) Grounds exist for the revocation of the agreement.″ Unconscionability is one ground on which a court may refuse to enforce an arbitration clause. (*Gatton, supra*, 152 Cal.App.4th at p. 579.) Section 1281.2 thus contemplates that unless otherwise agreed by the parties, the court, not the arbitrator, **[*19]** will determine both the existence of the arbitration agreement and any claim that it is unconscionable and should not be enforced. (See *Gatton*, at p. 579.)

Brown argues that the parties agreed to arbitrate all issues relating to the enforcement of the arbitration clause, including claims that the arbitration provision was unconscionable. It relies on the dispute resolution provision of the Frog Creek agreement, paragraph 25.1 of which states, ″This provision addresses the procedures for resolving any disputes between Owner and Contractor arising out of or relating to the interpretation, application, performance or breach of any term, condition or covenant of this Agreement.″ Paragraph 25.5 incorporates the Construction Industry Arbitration Rules of the American Arbitration Association (CIARAAA), rule 8(a) of which provides, ″The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.″ (*Rodriguez v. American Technologies, Inc.* (2006) 136 Cal.App.4th 1110, 1123 (*Rodriguez*).)

Assuming that Brown adequately preserved this claim for review, [5] we reject its contention that **[*20]** these provisions deprived the trial court of the ability to determine whether the arbitration clause was unconscionable. ″The question whether the parties have submitted a particular dispute to arbitration; *i.e.*, the '*question of arbitrability*,' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.' ″ (*Howsam v. Dean Witter Reynolds, Inc.* (2002) 537 U.S. 79, 83, quoting *AT&T Technologies v. Communications Workers* (1986) 475 U.S. 643, 649; see also *Dream Theater, Inc. v. Dream Theater* (2004) 124 Cal.App.4th 547, 552.) The provisions cited by Brown grant the arbitrator certain powers once a case has been sent to arbitration, but they do not clearly and unmistakably deprive the trial court of the authority to resolve issues concerning the validity of an arbitration clause that are reserved to it under the law. (Contrast *Rodriguez, supra,* 136 Cal.App.4th at p. 1123 [incorporation of rule 8(a) of CIARAAA gave the arbitrator the authority to determine scope of arbitral claims].)

Having concluded that the trial court had the power to determine unconscionability, the next question is whether it made such a finding in this case. In its written decision, the court determined (erroneously) that there was no existing arbitration agreement, but it also stated in a footnote, ″There is an issue of material disputed fact as to whether Drazan signed his revision of the contract containing his handwritten changes in late October 2002 or in December 2002. Regardless, the evidence is undisputed that [Brown], through its project manager (and the licensed contractor) Gary Moiseff, told Drazan that he must sign that revision of the agreement immediately or all work on the project would stop until an agreement was signed. . . . At the time, grading and foundation work was substantially underway, the rainy season of winter was lurking, and there were already drainage problems. . . . Plaintiff was concerned about problems caused by weather and delays to find a new contractor if work stopped at this point. . . . This supports a finding of **[*22]** oppression.″ From this we infer a finding of procedural unconscionability based on oppression. (See *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114 (*Armendariz*); *Morris, supra*, 128 Cal.App.4th at p. 1319.)

The problem with the trial court's ruling--that the circumstances under which Frog Creek executed its agreement were oppressive--is that it affects the validity of the agreement as a whole, not simply the arbitration clause. The court had the power to determine whether the arbitration clause itself was unconscionable based on matters particular to that aspect of the agreement, but a challenge to the contract's validity as a whole must be decided by arbitrator in the first instance, rather than by the court. (*Buckeye Check Cashing, Inc. v. Cardegna* (2006) 546 U.S. 440, 446; *Prima Paint v. Flood & Conklin* (1967) 388 U.S. 395; *Rosenthal v. Great Western Fin. Securities Corp., supra*, 14 Cal.4th at p. 419; *Higgins v. Superior*

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[5] In its renewed motion to compel arbitration, Brown argued generally that the court was required to compel arbitration based on the existence of a valid arbitration **[*21]** clause, but it did not specifically claim that paragraphs 25.1 and 25.5 grant the arbitrator the sole authority to determine arbitrability.

Court (2006) 140 Cal.App.4th 1238, 1250.) The purportedly oppressive circumstances prompting Frog Creek to execute the contract as a whole should not have been considered by the trial court in ruling on the motion to compel arbitration. **[*23]** They were matters to be considered, if at all, by the arbitrator. (*Higgins*, at p. 1250.)

We next consider whether other circumstances, which are particular to the arbitration clause and were cited by Frog Creek in its opposition to the renewed motion to compel, render that clause unconscionable. Our review of this issue based on undisputed facts is de novo. (*Murphy v. Check 'N Go of California, Inc.* (2007) 156 Cal.App.4th 138, 144; *Stirlen v. Supercuts, Inc.* (1997) 51 Cal.App.4th 1519, 1527.)

″ 'The prevailing view is that [procedural and substantive unconscionability] must *both* be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability.' [Citation.] But they need not be present in the same degree. 'Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves.' [Citations.] In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion **[*24]** that the term is unenforceable, and vice versa.″ (*Armendariz, supra*, 24 Cal.4th at p. 114.)

The circumstances particular to the arbitration clause that were cited by Frog Creek in support of its claim of procedural unconscionablity were: (1) the arbitration clause did not contain the notice required by *Business and Professions Code section 7191, subdivision (b)*, regarding the rights it waived by consenting to arbitration; and (2) the contract did not contain a copy of CIAR-AAA, the rules by which any arbitration was to be governed. Those circumstances supporting a claim of substantive unconscionability included: (1) the arbitration clause placed significant limits on discovery that impeded Frog Creek's ability to pursue its claim; (2) the arbitration clause provides for an unreasonably short limitations period (30 days); (3) the clause unreasonably requires that arbitration take place in San Francisco; and (4) the clause unfairly requires that the arbitrator have ″at least 10 years of relevant experience in design and construction matters,″ suggesting a bias toward Brown, a building contractor. [6]

Turning first to the claims of procedural unconscionability, the arbitration in this case did not comply with *Business and Professions Code section 7191. Subdivision (a)* of that statute requires that when a contract for work on residential property contains an arbitration clause, ″it shall be **[*26]** set out in at least 10-point roman boldface type or in contrasting red in at least 8-point roman boldface type, and if the provision is included in a typed contract, it shall be set out in capital letters.″ Subdivision (b) requires the inclusion of a notice, in the same typeface as required by subdivision (a), to the effect that by initialing and approving the arbitration clause, the consumer is giving up the right to a court or jury trial and to discovery and judicial review of the decision. Frog Creek does not contend that the failure to comply with *Business and Professions Code section 7191* rendered the contract unenforceable per se, but claims that

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[6] Frog Creek, an entity represented by legal counsel throughout most of the negotiations, **[*25]** characterizes the contract with Brown as one of adhesion; i.e., ″ '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.' [Citation.]″ (*Armendariz, supra*, 24 Cal.4th at p. 113.) Although much of the agreement consists of a standardized, preprinted form drafted by Frog Creek, the parties negotiated its terms and the operative version of the agreement contains handwritten modifications by Frog Creek. The arbitration clause at issue was modified--to extend to all claims, not just those involving an amount in controversy of less than $ 50,000--*at the request of Frog Creek*. We decline to treat the contract as one of adhesion, though this does not obviate the need to consider the claim of unconscionability. (See *Morris, supra*, 128 Cal.App.4th at pp. 1318-1319.)

the lack of information about the rights being waived by arbitration rendered the dispute resolution clause procedurally unconscionable. [7]

Though a more prominent typeface and a specific admonition regarding the rights being waived through an agreement to arbitrate would be laudable additions to any contract, their absence in this case did not render the arbitration clause procedurally unconscionable when Frog Creek in fact negotiated a material change to that clause and was represented by counsel at the time this change was made. Though Drazan averred by declaration that he was subjectively unaware of the rights he was waiving on behalf of Frog Creek, he had the opportunity to consult with counsel and suggest additional changes. Frog Creek cannot carry its burden of showing the arbitration agreement was the product of oppression or surprise. (Compare *Nyulassy v. Lockheed Martin Corp.* (2004) 120 Cal.App.4th 1267, 1285.)

Nor are we persuaded by the claim that the arbitration clause is procedurally **[*29]** unconscionable because it did not include a copy of CIARAAA, the rules by which any arbitration was to be governed. The arbitration clause clearly referenced these rules, and any party with questions as to their contents could have easily obtained a copy. More importantly, Frog Creek has not identified any rule or provision in the omitted AAA rules that would work to its disadvantage or disappoint its reasonable expectations. (Contrast *Harper v. Ultimo* (2003) 113 Cal.App.4th 1402, 1405-1407 [failure to attach Better Business Bureau rules caused oppression and surprise when those rules limited damages to $ 2500 for out-of-pocket loss and it was unclear which version of the rules were to apply].)

Because we conclude that Frog Creek failed to show procedural unconscionability regarding the arbitration provision when it opposed the renewed motion to compel arbitration, ″we need not address whether there was a showing of substantive unconscionability.″ (*Crippen v. Central Valley RV Outlet* (2004) 124 Cal.App.4th 1159, 1167.) We note, however, that the complaints about the discovery, venue and arbitrator provisions are not ″so one-sided as to 'shock the conscience' ″ and do not involve harsh **[*30]** or oppressive terms. (*24 Hour Fitness, Inc. v. Superior Court* (1998) 66 Cal.App.4th 1199, 1213.) As for the claim that the agreement sets a 30-day limitations period, this is not borne out by the language of the arbitration clause, paragraph 25.8 of which states ″. . . this dispute resolution procedure shall not in any way affect any statutes of limitation relating to any claim, dispute or other matter or question arising out of or relating to this Agreement.″

Frog Creek did not carry its burden of proving the arbitration provision was unconscionable. Because it raised no other viable defenses to the arbitration clause, the existence of which it admitted in its pleadings, the trial court erred in denying the renewed motion to compel arbitration.

DISPOSITION

The order denying the renewed motion to compel arbitration is reversed, and the trial court is directed to enter a new and different order staying the proceedings in the lawsuit and compelling arbitration. Costs on appeal are awarded to appellant.

NEEDHAM, J.

We concur.

JONES, P.J.

GEMELLO, J.

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[7] In a contract not involving interstate commerce and not subject to the FAA, the failure to comply with Business and Professions Code section 7191 would render the arbitration clause unenforceable by Brown. (*Woolls v. Superior Court* (2005) 127 Cal.App.4th 197, 214.) Here, however, the contract involves interstate commerce and section 7191 is preempted by the FAA, which provides in relevant part that **[*27]** arbitration provisions ″shall be valid, irrevocable, and enforceable, save upon such grounds that exist at law or equity for the revocation of any contract.″ (9 U.S.C. § 2.) Under this provision, ″[a] court may not invalidate an agreement to arbitrate under state laws that are only applicable to arbitration clauses.″ (*Hedges v. Carrigan* (2004) 117 Cal.App.4th 578, 584 [error to deny motion to compel arbitration based on statute requiring that residential real property contracts contain typeface and language similar to Business and Professions Code section 7191].)

Business and Professions Code section 7191 is not made directly applicable to this contract by the choice-of-law provision, which states, ″This Agreement shall be construed in accordance with and governed by the laws of the State of California.″ This language is not specific enough to overcome the FAA's prohibition against enforcing a state law provision that places stricter requirements on arbitration clauses than on contracts in general. (See *Mount Diablo Medical Center v. Health Net of California, Inc.* (2002) 101 Cal.App.4th 711, 724 [choice-of-law provision in contract governed by FAA should not be construed to incorporate **[*28]** state law reflecting a hostility to enforcement of arbitration provision that FAA was designed to overcome, absent ″unambiguous language in the contract making the intention to do so unmistakably clear″]; see also *Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, 390-394 [same].) Frog Creek does not contend otherwise.