



IN THE MISSOURI COURT OF APPEALS WESTERN DISTRICT

TELISSAH JOHNSON,	)	
	)	
Respondent,	)	
	)	
v.	)	WD84138
	)	
MENARD, INC.,	)	Opinion Filed: July 27, 2021
	)	
Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF PLATTE COUNTY, MISSOURI THE HONORABLE JAMES W. VAN AMBURG, JUDGE

Division Three: Edward R. Ardini, Jr., Presiding Judge,
Mark D. Pfeiffer, Judge and W. Douglas Thomson, Judge

Telissah Johnson (“Johnson”) sued her former employer, Menard Inc. (“Menard”), in the Circuit Court of Platte County alleging employment discrimination. Menard filed a motion to compel arbitration, which was denied by the trial court. Menard appeals from that order. We affirm.

Factual and Procedural Background

Johnson began working as a cashier at a Menard store in Kansas City, Missouri, on January 10, 2019. Upon beginning her employment, Johnson, an at-will employee, signed an Employee/Employer Agreement (“EEA”) that, among other things, included an arbitration

provision. Approximately a month later, Johnson made a written complaint of race discrimination to Menard's human resources department. Two weeks after that, Johnson was terminated.

Johnson filed a charge of discrimination with the Missouri Commission on Human Rights ("MCHR") alleging employment discrimination and retaliation. The MCHR issued her a right-to-sue letter, and on March 8, 2020, Johnson initiated the underlying action against Menard in the Circuit Court of Platte County.

On April 10, 2020, Menard filed a Motion to Compel Arbitration, claiming that the EEA she signed when she became employed by Menard required her to arbitrate her claims.¹ The EEA states, in relevant part:

6. Remedy. Arbitration shall be the sole and exclusive forum and remedy for all covered disputes of either Menard, INC or me. Unless Menard and I agree otherwise, any arbitration proceedings will take place in the county of my Menard's employment where the dispute arose. . . .

These claims shall be resolved by binding arbitration with the American Arbitration Association ("AAA") . . . under its current version of the National Rules for the Resolution of Employment Disputes. . . .

7. Severability. I agree that if the scope or enforceability of any part of this Agreement is in any way disputed at any time, a court or arbitrator may modify and enforce the Agreement to the extent that it believes to be reasonable under the circumstances existing at that time.

THIS DOCUMENT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY BOTH MENARD, INC AND ME. THE PARTIES ALSO AGREE THAT BOTH I AND MENARD, INC ARE EACH WAIVING THE RIGHT TO A TRIAL BY JURY OR PARTICIPATE IN A CLASS OR COLLECTIVE ACTION, OR CLASS OR COLLECTIVE ARBITRATION, AND THAT I AND MENARD, INC. EACH MAY BRING CLAIMS AGAINST THE OTHER IN MY OR ITS INDIVIDUAL CAPACITY ONLY AND NOT AS A CLASS MEMBER OR CLASS REPRESENTATIVE IN

¹ In its motion to compel arbitration, Menard made no assertion that the EEA contained a delegation provision that required threshold issues of arbitrability to be resolved by the arbitrator. Instead, Menard's suggestions in support of its motion to compel arbitration stated that "a **court** must determine whether a valid agreement to arbitrate exists between the parties, and whether the specific dispute falls within the scope of the agreement." (emphasis added). It was in its reply suggestions in support of its motion to compel arbitration that Menard first argued that the EEA contained a "valid, bilateral [delegation] agreement to submit the issue of arbitrability to an arbitrator."

ANY PURPORTED CLASS, COLLECTIVE OR REPRESENTATIVE PROCEEDING. I HAVE READ THIS ENTIRE AGREEMENT AND I FULLY UNDERSTAND THE LIMITATIONS WHICH IT IMPOSES UPON ME, AND I UNDERSTAND THAT THIS AGREEMENT CANNOT BE MODIFIED EXCEPT BY THE PRESIDENT OF MENARD, INC.

Johnson opposed the motion, arguing that the arbitration agreement contained in the EEA was not a valid, enforceable contract because it lacked consideration and contained illusory promises; and that collateral estoppel prohibited the trial court from compelling arbitration based on two circuit court judgments involving similar arbitration agreements with other Menard employees. And, although Menard's motion to compel made no mention of the existence of a delegation clause, Johnson's opposition to the motion to compel directly challenged the enforceability of the delegation clause in the agreement.² Argument on the motion was held on April 10, 2020, and the trial court granted Menard's motion to compel arbitration.

On August 10, 2020, Johnson filed a petition for a writ of mandamus with this Court. A preliminary writ was issued expressing, in part, concern that the consideration supporting both the delegation provision and the arbitration agreement as a whole was illusory, and ordering the trial court to vacate its order granting Menard's motion to compel arbitration or to show cause as to why it should not do so. On September 1, 2020, the trial court vacated its order compelling arbitration,³ and on November 2, 2020, the trial court entered an order denying Menard's motion to compel arbitration.⁴ Menard appeals from that denial.⁵

² In addition to noting that Menard's motion to compel made no assertion that the arbitration agreement contained a delegation provision granting an arbitrator exclusive jurisdiction to decide whether the agreement was valid and enforceable and pointing out that Menard's motion asked the *trial court* to enforce the arbitration agreement on the merits, Johnson also argued that any promises made by Menard in the EEA were illusory.

³ This Court then dismissed the petition for writ of mandamus as moot.

⁴ The trial court's denial of the motion to compel arbitration did not include any findings.

⁵ An order denying a motion to compel arbitration is appealable under section 435.440, RSMo. *Baker v. Bristol Care, Inc.*, 450 S.W.3d 770, 773 (Mo. banc 2014).

Standard of Review

“We review the circuit court’s denial of a motion to compel arbitration *de novo*.” *Pinkerton v. Technical Educ. Servs., Inc.*, 616 S.W.3d 477, 481 (Mo. App. W.D. 2020) (quoting *Fogelsong v. Joe Machens Auto. Grp. Inc.*, 600 S.W.3d 288, 293 (Mo. App. W.D. 2020)) (additional citation omitted). Whether a dispute is covered by an arbitration agreement and whether there is a valid, enforceable delegation clause in the arbitration agreement are legal issues that are both reviewed *de novo*. *Theroff v. Dollar Tree Stores, Inc.*, 591 S.W.3d 432, 436 (Mo. banc 2020) (citations omitted).

Discussion

Menard raises four points on appeal, all asserting that the trial court erred in denying its Motion to Compel Arbitration. In its first point, Menard argues that its motion to compel arbitration should have been granted because the arbitration agreement includes a delegation clause, which requires an arbitrator, and not the trial court, to decide threshold issues of arbitrability. In Points II and III, Menard asserts that the arbitration agreement contained in the EEA was valid in that it was supported by sufficient consideration.⁶ Finally, in its fourth point, Menard complains that circuit court cases denying arbitration in cases with similar EEAs cannot constitute collateral estoppel, arguing that “the previous cases involving Menard concerned contracts with different language and Missouri caselaw has changed.”⁷

“Arbitration is a matter of contract under the Federal Arbitration Act (FAA).” *Pinkerton*, 616 S.W.3d at 482 (quoting *Soars v. Easter Seals Midwest*, 563 S.W.3d 111, 114 (Mo. banc 2018))

⁶ Menard asserts in Point II that the arbitration agreement is a bilateral contract supported by mutual promises, and, in Point III, that Menard’s offer of at-will employment constituted sufficient consideration.

⁷ Because we find that neither the delegation provision nor the arbitration agreement is supported by valid consideration, we do not address the collateral estoppel issue raised in Point IV.

(additional citation omitted). “[P]arties to a contract may agree that an arbitrator rather than a court will resolve disputes arising out of the contract.” *TD Auto Fin., LLC v. Bedrosian*, 609 S.W.3d 763, 768 (Mo. App. E.D. 2020) (citing *Henry Schein, Inc. v. Archer and White Sales, Inc.*, 139 S.Ct. 524, 527 (2019); *Ellis v. JF. Enters., LLC*, 482 S.W.3d 417, 420 (Mo. banc 2016)). However, “[a] party cannot be required to arbitrate a dispute that it has not agreed to arbitrate[,]’ and arbitration will only be compelled where ‘a valid arbitration agreement exists and . . . the specific dispute falls within the scope of that agreement.’” *Hughes v. Ancestry.com*, 580 S.W.3d 42, 47 (Mo. App. W.D. 2019) (quoting *NutraPet Sys., LLC v. Proviera Biotech, LLC*, 542 S.W.3d 410, 413-14 (Mo. App. W.D. 2017); *Granger v. Rent-A-Ctr., Inc.*, 503 S.W.3d 295, 298 (Mo. App. W.D. 2016)). “‘Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question ‘who has the primary power to decide arbitrability’ turns upon what the parties agreed about *that* matter.’” *Id.* (quoting *Dotson v. Dillard’s, Inc.*, 472 S.W.3d 599, 603 (Mo. App. W.D. 2015); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 942 (1995)).

Delegation Provision

In Menard’s first point, it claims that the arbitration agreement signed by Johnson included a delegation provision that required an arbitrator to decide threshold questions of arbitrability.

“‘[A] delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement.’” *Soars*, 563 S.W.3d at 114 (quoting *Rent-A-Ctr. W., Inc. v. Jackson*, 561 U.S. 63, 68 (2010)). “Accordingly, it ‘is simply an additional, antecedent agreement the party seeking arbitration asks the . . . court to enforce, and the [Federal Arbitration Act] operates on this additional arbitration agreement just as it does on any other.’” *Id.* (quoting *Rent-A-Ctr.*, 561 U.S. at 70). “‘Generally, any silence or ambiguity concerning the scope of arbitrable issues should be

resolved in favor of arbitration.” *Id.* (quoting *State ex rel. Pinkerton v. Fahnestock*, 531 S.W.3d 36, 43 (Mo. banc 2017)). “However, when considering whether a court or an arbitrator should decide threshold questions of arbitrability, there is generally a presumption *against* arbitrability.” *Id.* (citing *First Options of Chi., Inc.*, 514 U.S. at 944-45). “[C]lear and unmistakable evidence’ the parties manifestly intended to arbitrate questions of arbitrability is required to overcome this presumption.” *Id.* (quoting *Rent-A-Ctr.*, 561 U.S. at 69 n.1). “This ‘clear and unmistakable’ requirement . . . pertains to the parties’ manifestation of intent that issues of arbitrability be decided by the arbitrator instead of the court.” *Pinkerton*, 531 S.W.3d at 43 (quoting *Rent-A-Ctr.*, 561 U.S. at 69 n.1).

In the present case, the parties mutually agreed that the AAA National Rules for the Resolution of Employment Disputes (“AAA rules”) would govern any claims brought by either party under the EEA. Johnson does not dispute that the claims she has asserted in the underlying action fall within the scope of the EEA and the arbitration provision contained therein. Moreover, the relevant AAA rules provide that “[t]he 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.” The explicit reference in the arbitration agreement to the AAA rules, which include the aforementioned provision, constitutes clear and unmistakable evidence that the parties intended that threshold questions of arbitrability be determine by the arbitrator. *See c.f. Cooper-Dorsey v. Time Warner Cable*, 591 S.W.3d 500, 506 (Mo. App. W.D. 2019) (finding that a reference to the Judicial Arbitration and Mediations Services, Inc. rules “clearly and unmistakably incorporated the delegation provision” within those rules); *Pinkerton*, 531 S.W.3d at 48 (finding that a reference to the AAA rules in the arbitration agreement is sufficient to establish that the parties intended to delegate threshold issues to arbitrability to an arbitrator). However, “[a]

delegation provision may be invalidated, revoked, or otherwise found unenforceable upon such grounds as exist in law or in equity for the revocation of any contract.” *Hughes*, 580 S.W.3d at 48 (quotation omitted). The contractual element at issue here is whether the delegation provision in the EEA was supported by valid consideration.

A delegation provision is a separate and distinct agreement and must be examined separate from the underlying arbitration agreement. *Soars*, 563 S.W.3d at 114. Like any contract, a delegation provision requires a mutual agreement between the parties. *Id.* at 116 (citing *Baker*, 450 S.W.3d at 776) (“A contract consisting of mutual promises to undertake some legal duty or liability between parties is a bilateral contract.”). “In a bilateral contract, ‘a promise by one party to a contract is a sufficient consideration for a promise by the other party.’” *Id.* (quoting *Ragan v. Schreffler*, 306 S.W.2d 494, 499 (Mo. 1957)).

“‘[B]ilateral contracts are supported by consideration and enforceable when each party promises to undertake some legal duty or liability.’” *Patrick v. Altria Grp. Distrib. Co.*, 570 S.W.3d 138, 143 (Mo. App. W.D. 2019) (quoting *Baker*, 450 S.W.3d at 777). “‘These promises, however, must be binding, not illusory.’” *Id.* (quoting *Baker*, 450 S.W.3d at 777). “‘A promise is illusory when one party retains the unilateral right to amend the agreement and avoid its obligation.’” *Id.* (quoting *Baker*, 450 S.W.3d at 777); *see also Morrow v. Hallmark Cards, Inc.*, 273 S.W.3d 15, 30 (Mo. App. W.D. 2008) (Ahuja, J., concurring) (“Under well-established contract law, an agreement in which one party retains the unilateral ability to avoid its contractual obligations is illusory and unenforceable.”); *Frye v. Speedway Chevrolet Cadillac*, 321 S.W.3d 429, 442 (Mo. App. W.D. 2010) (“A contract that purports to exchange mutual promises will be construed to lack legal consideration if one party retains the unilateral right to modify or alter the

contract as to permit the party to unilaterally divest itself of an obligation to perform the promise initially made.”).

For example, in *Patrick*, this Court found that a promise was illusory when the agreement gave a party “the unilateral right to make ‘material amendments’ to the dispute resolution agreement, which may include ‘change[s] in the allocation of fees and costs, the Disputes covered, or the limitations on remedies.’” 570 S.W.3d at 144. Similarly, in *Baker*, our Supreme Court found a promise to arbitrate illusory where the employer retained the right to “amend, modify or revoke [the] agreement upon thirty (30) days’ prior written notice to the Employee.” 450 S.W.3d at 776.

Here, the unfettered authority to unilaterally modify the delegation provision retained by Menard exceeded that at issue in both *Patrick* and *Baker*. The final sentence of the EEA states, “I UNDERSTAND THAT THIS AGREEMENT CANNOT BE MODIFIED EXCEPT BY THE PRESIDENT OF MENARD, INC.” This provision vested Menard, through its president, the unlimited and unilateral right to modify any part of the EEA, including the delegation provision, at any time and without notice to Johnson. In fact, under the auspices of this unqualified power, Menard could eliminate the delegation clause.⁸

Menard retained the unilateral authority to modify the delegation clause without limit or notice to Johnson. This rendered Menard’s promises illusory, and “[s]uch illusory promises provide no valid consideration.” *Harris v. Volt Mgmt. Corp.*, 2021 WL 1972434, *7 (Mo. App.

⁸ Menard acknowledged at oral argument that the above-mentioned provision vested its President with the unilateral authority to modify, in any manner, Menard’s promise to delegate threshold issues of arbitrability, up to and including the revoking of its promise to have such issues delegated to an arbitrator. Despite this admission to the direct applicability of this power to modify the delegation clause, Menard nevertheless argued that we were not permitted to consider this retained authority in our analysis of the validity of the delegation clause because its placement in the agreement was not in immediate proximity to the delegation clause. While this Court is aware that a delegation clause must be examined separate from the underlying arbitration agreement, this limitation does not preclude consideration of any terms that are directly applicable to the delegation clause. As Menard made clear at oral argument, the power of the President of Menard to unilaterally modify the agreement applies with full force to the delegation clause and thus is relevant to our analysis of the validity of that clause.

E.D. 2021) (promises to arbitrate and delegate threshold issues of arbitrability were illusory and not valid consideration where party retained unilateral right to modify employment agreement containing arbitration agreement and delegation provision without notice and at any time). As a result, the delegation provision contained in the EEA is not enforceable.

Point I denied.

Validity of the Arbitration Agreement

Having found that the trial court had the authority to determine threshold issues of arbitrability, including the validity and enforceability of the arbitration agreement, we now turn to the arbitration agreement itself.

Menard argues in its second point that the arbitration agreement “is supported by valid consideration in that, when severed, the arbitration provision is a valid, bilateral agreement by the parties to submit their claims in arbitration.” The arbitration agreement itself, however, suffers from the same infirmity as the delegation provision. Indeed, the unqualified right to unilaterally modify retained by Menard through the EEA provided Menard the ability to amend or outright eliminate, without limitation, its obligations under the arbitration agreement. As stated above, this authority renders its promise to arbitrate disputes illusory. *See Patrick*, 570 S.W.3d at 144 (finding that an arbitration agreement included illusory promises when it allowed an employer to make “‘material amendments’ to the dispute resolution agreement, which may include ‘change[s] in the allocation of fees and costs, the Disputes covered, or the limitations on remedies.’”); *Baker*, 450 S.W.3d at 776 (finding that an employer’s promise to arbitrate its claims against an employee were illusory where the employer retained the right to “amend, modify or revoke [the] agreement upon thirty (30) days’ prior written notice to the Employee.”).

Therefore, like the delegation provision, the arbitration agreement as a whole is founded on Menard's illusory promise to arbitrate disputes, and, as such, it lacks consideration and is unenforceable.

Point II denied.⁹

Conclusion

The order of the trial court overruling Menard's motion to compel arbitration is affirmed.



EDWARD R. ARDINI, JR., JUDGE

All concur.

⁹ Because we find that the arbitration agreement lacked consideration, we need not address Menard's third point, which argued that the arbitration agreement did not lack consideration simply because it was part of an at-will employment agreement.