

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

CAROL WHITWORTH

RESPONDENT,

**v.
McBRIDE & SON HOMES, INC.,
ET AL.**

APPELLANTS.

DOCKET NUMBER WD72466

DATE: April 5, 2011

Appeal From:

Clay County Circuit Court
The Honorable Anthony R. Gabbert, Judge

Appellate Judges:

Division Three: Cynthia L. Martin, Presiding Judge, James E. Welsh, Judge and Gary D. Witt,
Judge

Attorneys:

Mark A. Jess, Christie E. Jess and John J. Ziegelmeier III, Kansas City, MO, for respondent.

Jill A. Morris and Robert L. Ortvals, Jr., Kansas City, MO, for appellants.

MISSOURI APPELLATE COURT OPINION SUMMARY

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CAROL WHITWORTH,

RESPONDENT,

v.

**McBRIDE & SON HOMES, INC.,
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APPELLANTS.

No. WD72466

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Before Division Three: Cynthia L. Martin, Presiding Judge, James E. Welsh, Judge and Gary D. Witt, Judge

Carol Whitworth was terminated from McBride & Son Homes, Inc. by her supervisor, Dennis Shriver. Whitworth filed suit against McBride & Son and Shriver asserting employment discrimination claims. McBride & Son and Shriver filed a motion to compel arbitration of the claims. McBride & Son asserted that an employment contract, a subsequently presented and signed application and arbitration agreement, and an employee handbook operated collectively to create “arbitration agreements” requiring Whitworth to comply with the dispute resolution procedures described in the handbook. The motion to compel arbitration was denied by the trial court. McBride & Son and Shriver appeal.

McBride & Son and Shriver argue that the trial court erred in denying their motion to compel arbitration because (1) the initial offer of employment to Whitworth, the promise to pay Whitworth commissions, and McBride & Son’s mutual promise to abide by the handbook’s dispute resolution procedures each provided adequate consideration to permit enforcement of the “arbitration agreements;” (2) the “arbitration agreements” were not unconscionable; and (3) Shriver should be able to enforce the “arbitration agreements.”

AFFIRMED

(1) We review *de novo* the issue of whether a dispute is subject to arbitration. We consider three factors. First, we determine whether a valid arbitration agreement exists. Second, if a valid arbitration agreement exists, we determine whether the specific dispute falls within the scope of the arbitration agreement. Third, if a valid arbitration contract exists, and if the subject dispute is within the scope of the arbitration provision, we determine whether the arbitration agreement is subject to revocation under applicable contract principles. In making these determinations, we apply the usual rules of state contract law and canons of contract interpretation.

(2) If the trial court's ruling on a motion to compel arbitration includes factual findings which bear on these three factors, the factual findings will be affirmed if they are supported by substantial evidence, and are not against the weight of the evidence.

(3) The three elements required to form a valid contract in Missouri are offer, acceptance, and bargained for consideration.

(4) The employment agreement signed by Whitworth contained a bare agreement to arbitrate claims, without reference to the handbook or to any particular arbitration procedures. The integration clause in the contract prohibited inclusion of the handbook terms (which the defendants seek to enforce) in the employment agreement.

(5) The application and a separate document entitled arbitration agreement presented to Whitworth a week after she signed the employment contract are not signed by McBride and Son. The arbitration agreement references Whitworth's agreement to be bound by McBride & Son's "dispute resolution procedures." These procedures appear in the handbook.

(6) The combination of the arbitration agreement and the handbook fail to establish an offer and acceptance to enter into a binding arbitration agreement. The handbook expressly advises that its contents are informational only, do not constitute a contract, and are not intended to confer any contractual rights or privileges on an employee. The dispute resolution procedures are not excepted from this language. As such, the handbook was not an offer to contract to which Whitworth could respond by acceptance, a conclusion unaltered by the fact that the dispute resolution procedures in the handbook are referenced in the arbitration agreement.

(7) Moreover, the handbook clearly expressed that no representative of McBride & Son other than its President had the authority to enter into any contract of employment, and that no contract would be enforceable against McBride & Son unless in writing and signed by the President. The employment agreement was signed by a representative of McBride & Son, but not by its President. Neither the application, the arbitration agreement, nor the handbook was signed by any representative of McBride & Son. Thus, by McBride & Son's directive, these documents were not enforceable contracts.

(8) Even if McBride & Son could demonstrate a valid offer by it and acceptance by Whitworth of a document intended to be a binding contract to arbitrate, the "arbitration agreements" McBride & Son and Shriver seek to enforce fail for want of adequate consideration.

(9) Whitworth did not enter into the "arbitration agreements" the defendants seek to enforce (the terms of the handbook) in consideration for an initial offer of at-will employment. Instead, for several years before signing the employment contract, she had been an independent contractor for McBride & Son. In any event, Whitworth did not sign the arbitration agreement which incorporates the handbook's dispute resolution procedures until at least a week after she signed the employment contract. An offer of continued employment to an at-will employee does not provide adequate consideration for an arbitration agreement enforceable after termination of employment.

(10) The promise to pay commissions does not provide adequate consideration for an arbitration agreement enforceable after termination of employment.

(11) McBride & Son retained the unilateral right to modify and alter the terms and provisions of the handbook (including the dispute resolution procedures) without the provision of notice to employees. Thus, even if McBride & Son committed to abide by the dispute resolution provisions in the handbook, that promise is illusory, and does not constitute adequate consideration for an enforceable arbitration contract.

(12) As McBride & Son and Shriver cannot establish the existence of a valid and enforceable contract to arbitrate, their motion to compel arbitration was properly denied. We need not address, therefore, whether the trial court correctly concluded that the “arbitration agreements” were unconscionable, or whether Shriver should be permitted to enforce the “arbitration agreements.”

Opinion by Cynthia L. Martin, Judge

April 5, 2011

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