2024 IL App (1st) 230361-U

FIRST DISTRICT,
FIRST DIVISION
January 16, 2024

No. 1-23-0361

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CHARLES ARBOGAST, Plaintiff-Appellant, v. CHICAGO CUBS BASEBALL CLUB, LLC, CHICAGO NATIONAL LEAGUE BALL CLUB, INC., and CHICAGO CUBS, INC., Defendants (Chicago Cubs Baseball Club, LLC, Defendant-Appellee).	Appeal from the Circuit Court of Cook County, Illinois. Nos. 2022 L 2404 2022 L 2405 Honorable Catherine A. Schneider, Judge Presiding.

JUSTICE COGHLAN delivered the judgment of the court.
Justices Lavin and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court's order granting defendant's motion to dismiss and compel arbitration is reversed. While the trial court did not abuse its discretion in finding that a contract was formed between the parties, the arbitration provision was procedurally unconscionable.

¶ 2 Plaintiff Charles Arbogast filed a complaint against defendant Chicago Cubs Baseball Club, LLC (Cubs) related to injuries he sustained at Wrigley Field while working as a

photographer for the Associated Press. Defendant moved to dismiss the complaint and compel arbitration pursuant to section 2-619(a)(1) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(1) (West 2020)), arguing that plaintiff's use of his media credential to enter Wrigley Field constituted acceptance of the "conditions" on the back of the credential. One of those "conditions" provided that plaintiff accepted the full Terms and Conditions on the website provided, which included a mandatory arbitration provision. The trial court initially denied the Cubs' motion to dismiss and compel arbitration, without prejudice. This court affirmed on appeal, finding that there was a genuine issue of material fact as to whether plaintiff and the Cubs entered into a contract. *Arbogast v. Chicago Cubs Baseball Club, LLC*, 2021 IL App (1st) 210526, ¶ 32.

¶ 3 On remand, the trial court conducted a summary proceeding pursuant to section 2(a) of the Uniform Arbitration Act (710 ILCS 5/2(a) (West 2020)) to determine whether there was an enforceable arbitration agreement between the parties. Following discovery and supplemental briefing limited to that issue, the trial court granted the Cubs' motion to dismiss and compel arbitration. The court found that a contract existed between plaintiff and the Cubs, and that the arbitration provision was not procedurally or substantively unconscionable. For the following reasons, we reverse and remand for further proceedings.

¶ 4 BACKGROUND

¶ 5 On May 28, 2020, plaintiff, a photographer for the Associated Press, filed a complaint against the Cubs, Chicago National League Ball Club, Inc., and Chicago Cubs, Inc., alleging negligence and violation of the Premises Liability Act. On July 26, 2018, plaintiff "fell and sustained injuries" while taking photographs in the photo well outside of first base at Wrigley Field. Plaintiff claimed that the defendants were negligent in allowing "pallets to be stacked on

top of each other" in the photo well for photographers to "stand on while photographing the baseball game," creating a "fall and/or trip hazard."

¶ 6 The Cubs filed a section 2-619(a)(1) motion to dismiss and compel arbitration, arguing that plaintiff used a media credential to enter Wrigley Field, which contained terms and conditions requiring the parties to arbitrate the dispute. The front of the credential contained plaintiff's name and photograph. The reverse side provided several conditions, stating, as follows:

"**CONDITIONS**

Bearer is hereby granted admission to 2018 Major League Baseball regular season games, workouts, activities and events (the "Games") on the following conditions, which are accepted and agreed upon by Bearer.

1. The Major League Clubs are the exclusive owners of all proprietary rights in their names, logos and uniform designs, and in Games and Game Information, except for Bearer's Game Information created pursuant to this credential.

2. Bearer assumes all risks incidental to the performance of his/her services and/or incidental to Games, including the risk of being injured by thrown bats, bat fragments and thrown or batted balls.

3. THIS CREDENTIAL MAY BE REVOKED AT ANY TIME WITHOUT CAUSE.

4. While within the ballpark, Bearer shall be subject to the direction and/or supervision of the Club and its designated agents.

5. Bearer acknowledges receipt and review of, and agrees to be bound by, the further terms and conditions contained on the website of the Office of the Commissioner of Baseball at MLBPressbox.com."

¶ 7 In addition to requiring the use of a device with Internet access, entering the MLBPressbox website did not directly reveal the "Major League Baseball Credential Terms & Conditions" (Terms and Conditions). In order to find the Terms and Conditions, the user was required to search within the website, containing multiple hyperlinks on a variety of topics, before reaching the "Credential Terms & Conditions" hyperlink. The "Credential Terms & Conditions" hyperlink contained 25 paragraphs, spanning six pages.

¶ 8 The Terms and Conditions stated, in relevant part:

> **"THESE TERMS AND CONDITIONS ARE APPLICABLE TO (A) BEARERS OF CREDENTIALS MARKED MEDIA, TECH, PHOTO, PHOTOGRAPHER, EVENT BROADCAST, MLB NETWORK OR RIGHTSHOLDER (COLLECTIVELY, 'MEDIA BEARERS') ***.**
>
> **IMPORTANT: BEARER'S CREDENTIAL OR ACCESS BADGE (COLLECTIVELY, 'CREDENTIAL') IS A REVOCABLE LICESNE AND MAY BE REVOKED AT ANY TIME WITHOUT CAUSE.**
>
> Each Bearer signing for or using a Credential, including his/her/its employers and employees, for games, workouts, activities, attractions and events associated with Major League Baseball (each an 'Event' and, collectively, the 'Events') agrees *** to the following terms and conditions (the 'Agreement') ***.
>
> ***
>
> 22. **FOR MEDIA BEARERS AND ACCESS BADGE BEARERS ONLY:** Unless prohibited by federal law, Bearer and the MLB Entities agree to arbitrate any and all Claims, except for Claims concerning the validity, scope or enforceability of this **MANDATORY ARBITRATION AGREEMENT & CLASS ACTION WAIVER**

(the 'Arbitration Agreement'), through **BINDING INDIVIDUAL ARBITRATION. *** BEARER AND THE MLB ENTITIES ARE EACH WAIVING THE RIGHT TO A COURT OR JURY TRIAL. ALL DISPUTES SHALL BE ARBITRATED ON AN INDIVIDUAL BASIS** ***."

¶ 9 Binding arbitration was required to take place in New York. The arbitration provision also provided, "BEARER HAS THE RIGHT TO REJECT THIS ARBITRATION AGREEMENT, BUT BEARER MUST EXERCISE THIS RIGHT PROMPTLY" by "mailing a written opt-out notice, postmarked within seven (7) days after the date of the applicable Event." The opt-out notice "must include Bearer's full name, address, [and] account number ***."

¶ 10 The Cubs' motion was supported by the affidavit of Alex Wilcox, the Cubs' media relations coordinator and supervisor of media relations. Wilcox averred that plaintiff had obtained a media credential for each Major Leage Baseball (MLB) season since 2010, which "gave him access to [MLB] events, including Cubs games at Wrigley Field, and a license to take photographs thereat." Plaintiff was "required to wear and display" the credential at all games. Wilcox believed that Michael Green applied for the 2018 season media credential on plaintiff's behalf, which required Green "to click an acknowledgement stating that 'I've read and agree to the Terms and Conditions.' " The website where the Terms and Conditions can be found "currently requires a password but during the 2018 season it did not."

¶ 11 According to Wilcox, the Cubs' "scanning logs" show that plaintiff "used the credential to access Wrigley Field" for 18 games during the 2018 season. His credential was scanned 41 times, including twice on the date of the accident. Plaintiff was granted access "to the area referenced in his complaint, which was not open to the general public, only because he *** displayed the aforesaid credential."

¶ 12 Plaintiff responded that he "did not have a contractual relationship" with the Cubs. In his own affidavit, plaintiff averred that he never signed an agreement with the Cubs and "never gave Michael Green nor anyone at the Associated Press permission and/or authority to sign an arbitration agreement on [his] behalf." He did not have an account number with the Cubs or the MLB and had spent 23 days in the hospital following his injury. Alternatively, relying on *Zuniga v. Major League Baseball*, 2021 IL App (1st) 201264, plaintiff argued that the arbitration provision was procedurally and substantively unconscionable.

¶ 13 On April 16, 2021, the trial court struck the Cubs' motion to dismiss without prejudice, agreeing "that *Zuniga v. Major League Baseball* is controlling authority." On April 19, 2021, the trial court denied the Cubs' motion to dismiss and compel arbitration. The Cubs appealed, and this court affirmed, finding that "a genuine issue of material fact exists about whether any contract existed between plaintiff and the Cubs in this context." *Arbogast*, 2021 IL App (1st) 210526, ¶ 25.[1] The "procedure and the nature of the hearing *** to resolve the issues of contract formation" was left to "the discretion of the trial court." *Id.* ¶ 35.

¶ 14 On remand, the Cubs filed a "Motion to Compel Arbitration and to Conduct a Summary Proceeding Pursuant to Section 2(A) of the Uniform Arbitration Act," which incorporated its motion to dismiss and compel arbitration by reference. The Cubs argued that the trial court was required to conduct a summary proceeding to determine whether the parties entered into a valid arbitration agreement. See 710 ILCS 5/2(a) (West 2020). The trial court granted the Cubs' motion over plaintiff's objection. Limited discovery was conducted on the "validity and enforceability of the arbitration agreement."

[1] In light of the trial court's denial without prejudice, "we interpret[ed] the trial court's ruling to be that an enforceable arbitration provision had not been shown at that point but could be established in the future, after discovery had been obtained." *Arbogast*, 2021 IL App (1st) ¶ 34 n.3.

¶ 15 At his deposition, plaintiff testified that he had worked as a staff photographer for the Associated Press since 1989 and covered Cubs games at Wrigley Field for the past 10 years. The photographs plaintiff took at Wrigley Field for the Associated Press were "available to the membership of the Associated Press and anyone else who is a subscriber ***."

¶ 16 Plaintiff picked up his 2018 season media credential from the Associated Press office. He believed that the credential had been left for him by Michael Green. He had the credential from April of 2018 until July 26, 2018, and had the ability to read and access the Internet during that time. Plaintiff brought his credential "every time" he went to Wrigley Field, either on a lanyard around his neck, in a jacket pocket, or "inside [his] shirt." There was "no case for it," it just "clip[ped] to the lanyard." Plaintiff denied "us[ing] the media credential to enter Wrigley Field on the date of the injury," stating, "I walk into the stadium as an [Associated Press] photographer. Whether or not my credential is used to do that, I couldn't tell you." Plaintiff acknowledged using "the media credential to enter Wrigley Field" "at some point" during the 2018 season, but "[did] not recall" using the credential to enter Wrigley Field on the date of the accident. Plaintiff "never scanned [his] credential" or presented it to be scanned, but admitted that "there's been occasions when some people working at Wrigley Field just walked up to [him] and grabbed the credential from [his] neck and scanned it." Plaintiff claimed that he had "never seen the backside of [his] credential before."

¶ 17 On October 31, 2022, plaintiff filed a supplemental response to the Cubs' motion to dismiss and compel arbitration. Plaintiff argued that he did not enter into a contract with the Cubs since he was "allowed to enter Wrigley Field [as] an Associated Press photographer." He further claimed that he "never scanned his credential at Wrigley Field," "never looked at the backside of his media credential," and had "no notice of any terms and conditions."

¶ 18 Plaintiff also asserted that the arbitration provision was procedurally unconscionable because the MLBPressbox.com URL on the credential "is tiny, in regular font that is the same font and color as the rest of the language on the credential," and the "word 'arbitration' does not appear anywhere on the credential." Additionally, after accessing MLBPressbox.com, "the user must then click through another web page to reveal the six page, 25-paragraph boilerplate contract containing an arbitration provision buried at paragraph 22." (Emphasis omitted.) Plaintiff also argued that the "unreasonably short time" of seven days to mail a written opt-out notice that must include an MLB account number, which he did not have, rendered the arbitration provision substantively unconscionable.

¶ 19 The Cubs replied that there was a contract between the parties because a "media credential *** is a revocable license," "[i]ts use establishes that an agreement exists granting its bearer admission conditioned on his assent to its terms and conditions," and the "unrebutted evidence" shows that plaintiff "used the media credential to enter Wrigley Field on the date of the occurrence." The Cubs also argued that plaintiff should be equitably estopped from denying that a contract was formed because "an agency relationship existed between Plaintiff and the [Associated Press]" and plaintiff "knew that the [Associated Press] obtained the credential from the Cubs." Additionally, under the "direct benefits" theory of equitable estoppel adopted by federal courts, plaintiff directly benefitted from using the media credential to cover games at Wrigley Field as a "salaried photographer" and to "generate[ ] revenue" for the Associated Press.

¶ 20 The Cubs argued the arbitration provision was not procedurally unconscionable because plaintiff had "abundant opportunity to become familiar with the terms of the media credential."

As to substantive unconscionability, plaintiff could have read the opt-out provision after his injury, as he "was actively using the internet during the opt-out period."[2]

¶ 21 In Wilcox's supplemental affidavit, he attested that he approved applications for media credentials as part of his job. Representatives of accredited media organizations apply for media credentials on behalf of their members at credentials.mlb.com. The "last step of the application requires the representative to check a box acknowledging that they have read and agree to the Terms and Conditions." The acknowledgement includes a hyperlink directing the representative to the MLB Credential Terms & Conditions. The "applicant cannot submit the application without first clicking the acknowledgement that they read and agree to the Terms and Conditions."[3] The Cubs' records attached to Wilcox's affidavit indicate that on March 15, 2018, Peter Hermann, an Associated Press employee, submitted the 2018 season credential application on behalf of plaintiff and nine other Associated Press photographers. Wilcox acknowledged mistakenly asserting that Green had submitted plaintiff's media credential application in his initial affidavit.

¶ 22 Wilcox further attested that plaintiff has a user profile on credentials.mlb.com with "a record of each event that [plaintiff] has received a credential to attend." These records indicate that his 2018 season media credential was printed on April 10, 2018, and he "received season media credentials from the Cubs for every MLB season since 2010." Each media credential has a unique barcode and "[w]hen a bearer uses a credential to gain admission at Wrigley Field and the field entrance therein, the credential is scanned and the event is recorded in a scanning log." The

[2] In his response to the Cubs' requests to admit, plaintiff admitted that he posted on Facebook on July 29, 2018 and July 31, 2018.

[3] Attached to Wilcox's affidavit were screenshots from the "2020 Cubs Full Season Credentials," showing the application process. The last step is titled "Terms and Conditions." Next to a checkbox underneath "Terms and Conditions" states, "I've read and agree to the Terms and Conditions." The "Terms and Conditions" are hyperlinked.

scanning logs indicate that plaintiff attended 18 games during the 2018 season prior to the accident. His credential was scanned 41 times from April 17, 2018 through July 26, 2018. On the day of the accident, plaintiff's credential was scanned at both the "media entrance" and the "field entrance."

¶ 23 On February 7, 2023, the trial court granted the Cubs' motion to dismiss and compel arbitration, finding that a contract existed between plaintiff and the Cubs. The court noted that "the back of the credential states in bold capital letters, 'CONDITIONS' " upon which the bearer is granted access to games. The media credential "with this language, was worn around [plaintiff's] neck or was kept inside his coat pocket while working." Although plaintiff claims that he never looked at the back of the media credential, "he possessed the credential for three months before the accident[,] had ample opportunity to read and notice the back of the pass," and there was no evidence that the back was "obstructed or obscured so as to prevent plaintiff from reading or noticing the condition statement." The trial court rejected plaintiff's claim that he "neither presented nor ever scanned his credential" based on evidence showing that he "scanned his pass 41 times during 18 games prior to the incident, and even scanned his credential twice on the date of the incident." Plaintiff also received a "direct benefit" by taking photos and "be[ing] paid for his work." Accordingly, "there was a contract and plaintiff assented to it through his continued actions and utilization of the media credential to his own benefit."

¶ 24 The trial court also concluded that the arbitration provision was not procedurally unconscionable because it "is not inconspicuous," the "express language of the arbitration agreement is clear and unambiguous," and there is "no maze of fine print." Further, plaintiff "had ample opportunity to read the back of the credential, as he possessed it for three months prior to the accident, attended 18 games in the 2018 season where his credential was scanned 41 times,

and had access to the internet." While there was a "slight degree of substantive unconscionability" by requiring the written opt-out notice to include an account number, which plaintiff did not have, this was "insufficient to render the arbitration provision unenforceable." Finally, the court refused to strike Wilcox's supplemental affidavit because the name of the Associated Press representative who applied for plaintiff's credential is "not a material fact that changes the nature of the affidavit or affects the ruling."

¶ 25 ANALYSIS

¶ 26 Standard of Review

¶ 27 Section 2-619(a)(1) provides for the involuntary dismissal of an action on the basis that the court does not have jurisdiction of the subject matter of the action. See 735 ILCS 5/2-619(a)(1) (West 2020). Section 2-619(a)(1) is "an appropriate provision by which a defendant may compel compliance with a binding arbitration provision." *Arbogast*, 2021 IL App (1st) 210526, ¶ 16 (citing *Borowiec v. Gateway 2000, Inc.*, 209 Ill. 2d 376, 383 (2004)). We interpret all pleadings and supporting documents in the light most favorable to the nonmoving party. *Id.*

¶ 28 Section 2(a) of the Uniform Arbitration Act provides that "if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied." 710 ILCS 5/2(a). The court must make a "substantive disposition" of the issues raised by the motion to compel arbitration "in which the trial court separately addresses each issue raised by the motion, supporting its resolution of each issue with specific factual findings or legal reasons." *Sturgill v. Santander Consumer USA, Inc.*, 2016 IL App (5th) 140380, ¶ 24.

¶ 29 Initially, the parties disagree over the applicable standard of review. Plaintiff asserts that because the trial court did not conduct an evidentiary hearing, our review is *de novo*. The Cubs argue that because the trial court made findings of fact regarding whether plaintiff and the Cubs entered into a contract, we should review the trial court's finding regarding contract formation for an abuse of discretion, but its ruling on unconscionability *de novo*.

¶ 30 A ruling on a motion to compel arbitration "where there was no evidentiary hearing *or findings of fact*, raises purely legal issues that are reviewed *de novo*." (Emphasis added.) *Clanton v. Oakbrook Healthcare Centre, Ltd.*, 2023 IL 129067, ¶ 31; see also *Zuniga*, 2021 IL App (1st) 201264, ¶ 11 (*de novo* standard of review applied where the trial court made its ruling "without conducting an evidentiary hearing, the underlying facts were not in dispute, and the trial court's order involved applying the law to undisputed facts"). "When factual findings are made, the decision of whether to compel arbitration is not made as a matter of law," and is reviewed for an abuse of discretion. *Brookner v. General Motors Corp.*, 2019 IL App (3d) 170629, ¶ 16; see also *Peregrine Financials and Securities v. Hakakha*, 338 Ill. App. 3d 197, 202 (2003) (*de novo* standard of review applied where the trial court's ruling was "clearly one of law, and the relevant underlying facts are not in dispute").

¶ 31 While the trial court did not conduct an evidentiary hearing, it made findings of disputed fact, including the manner in which plaintiff used his media credential and whether the parties entered into a contract. See *Pepper Construction Co. v. Palmolive Tower Condominiums, LLC*, 2016 IL App (1st) 142754, ¶ 81 ("Whether a contract exists, its terms, and the parties' intent are questions of fact to be determined by the trier of fact"). Therefore, the trial court's ruling as to contract formation was not made as a matter of law, and we review that ruling for an abuse of discretion. However, "the determination of whether a contract or a portion of a contract is

unconscionable is a question of law, which we review *de novo*." *Kinkel v. Cingular Wireless LLC*, 223 Ill. 2d 1, 22 (2006).

¶ 32 Wilcox's Supplemental Affidavit

¶ 33 Plaintiff asks this court to "disregard[ ]" Wilcox's supplemental affidavit because he has "already offered admittedly false testimony" by previously attesting that Green applied for plaintiff's 2018 season media credential. We review the trial court's refusal to strike Wilcox's supplemental affidavit for an abuse of discretion. *Rigoli v. Manor Care of Oak Lawn (West) IL, LLC*, 2019 IL App (1st) 191635, ¶ 24.

¶ 34 Illinois Supreme Court Rule 191(a) requires that affidavits submitted in connection with section 2-619 motions for involuntary dismissal (1) be made on the personal knowledge of the affiant; (2) set forth with particularity the facts upon which the claim, counterclaim, or defense is based; (3) attach sworn or certified copies of all documents upon which the affiant relies; (4) not consist of conclusions but of facts admissible in evidence, and (5) affirmatively show that the affiant, if sworn as a witness, can testify competently thereto. Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013). "If, from the document as a whole, it appears that the affidavit is based upon the personal knowledge of the affiant and there is a reasonable inference that the affiant could competently testify at trial, Rule 191 is satisfied." *Piser v. State Farm Mutual Automobile Insurance Co.*, 405 Ill. App. 3d 341, 350 (2010).

¶ 35 Wilcox explained, based on his "personal knowledge of the application process," specific facts, and Cubs' records, that Green had submitted the application other years, but Hermann submitted the application for the 2018 season. Wilcox's admission that he mistakenly believed that Green submitted the 2018 media credential application does not run afoul of Rule 191(a). Although Wilcox failed to attach a copy of the actual 2018 media credential application

submitted by Hermann, he attached other documents establishing the nature of the application process and confirming that Hermann submitted the 2018 media credential application on plaintiff's behalf. Accordingly, the trial court did not abuse its discretion in declining to strike Wilcox's supplemental affidavit.

¶ 36 Contract Formation

¶ 37 "[T]here is no arbitration without a valid contract to arbitrate." *Aste v. Metropolitan Life Insurance Co.*, 312 Ill. App. 3d 972, 975 (2000). When a party opposing arbitration contests that he has entered into a contract with the party seeking to compel arbitration, this presents a threshold question to be resolved by the court. *Arbogast*, 2021 IL App (1st) 210526, ¶ 18. Whether a contract exists is decided according to state law principles of contract formation. *Id.*

¶ 38 Contract formation requires an offer, an acceptance, and consideration. *Melena v. Anheuser-Busch, Inc.*, 219 Ill. 2d 135, 151 (2006). An enforceable contract also requires a meeting of the minds or mutual assent as to the terms of the contract. *Urban Sites of Chicago, LLC v. Crown Castle USA*, 2012 IL App (1st) 111880, ¶ 51. "Generally, it is the objective manifestation of intent that controls whether a contract has been formed" and the "subjective understanding of the parties is not required for there to be a meeting of the minds." *Id.* The most common way to show mutual assent is through a signature on a contract. *Hedlund & Hanley, LLC v. Board of Trustees of Community College District No. 508*, 376 Ill. App. 3d 200, 206 (2007). However, "[i]t is well settled that a party named in a contract may, by his acts and conduct, indicate his assent to its terms and be bound by its provisions even though he has not signed it." *Landmark Properties, Inc. v. Architects International-Chicago*, 172 Ill. App. 3d 379, 383 (1988); see also *Midland Hotel Corp. v. Reuben H. Donnelley Corp.*, 118 Ill. 2d 306, 313

(1987) ("It suffices that the conduct of the contracting parties indicates an agreement to the terms of the alleged contract" (internal quotation marks omitted)).

¶ 39 Plaintiff argues that he did not have a contract with the Cubs because he "never agreed to any terms and conditions" and "[t]here is no evidence *** that [he] had notice of any terms and conditions." To determine whether a contract was formed, we look to the parties' objective conduct rather than their subjective understanding of the contract's terms. See *id.* (the parties' "subjective understanding of the terms of the contract is immaterial").

¶ 40 Through the use of his media credential, plaintiff was granted access to Wrigley Field to take photographs for his job, subject to the conditions listed on the back of the credential. Plaintiff testified that he always brought his media credential to Wrigley Field, that it was either hanging around his neck on a lanyard or in his pocket, and that it was not kept in a case. Regardless of whether plaintiff read them, the conditions on the back of the credential were visible to plaintiff, and sufficient to put him on notice that his use of the credential was subject to those conditions. See *Gupta v. Stanley Smith Barney, LLC*, 934 F.3d 705, 714 (7th Cir. 2019) (plaintiff accepted arbitration agreement through "silence and continued employment," despite the fact he did not read the email giving notice of the arbitration agreement); see also *Soderholm v. Chicago National League Ball Club, Inc.*, 225 Ill. App. 3d 119, 125 (1992) (finding that "[n]either an individual ticket holder nor a season ticket holder is entitled to enter the ball park except upon the terms and conditions specified on the individual tickets and by defendant's policies").

¶ 41 Plaintiff claims that he was "allowed to enter Wrigley Field [as] an Associated Press photographer" and "never presented his media credential to an employee at Wrigley Field to be scanned," but, as discussed herein, the Cubs' scanning logs suggest otherwise. Plaintiff also

relies on this court's related opinion, where we noted that the "contractual nature of the physical credential itself is not obvious," as it does not require a recipient to sign it. *Arbogast*, 2021 IL App (1st) 210526, ¶ 28. Unlike in the instant appeal, our earlier analysis was limited to determining whether any disputed issues of material fact existed regarding contract formation. *Id.* ¶ 32. After conducting a summary proceeding, including reviewing plaintiff's deposition testimony regarding the nature of his use of the media credential, the trial court concluded that a contract was formed based on the parties' objective conduct. We cannot say that this conclusion is "arbitrary, fanciful, or unreasonable, or [that] no reasonable person would take the same view."[4] *Favia v. Ford Motor Co.*, 381 Ill. App. 3d 809, 815 (2008). Therefore, the trial court did not abuse its discretion in concluding that a contract was formed.

¶ 42 Unconscionability

¶ 43 Alternatively, plaintiff argues that the arbitration provision is both procedurally and substantively unconscionable. An arbitration provision may be invalidated by state law contract defenses such as fraud, duress, or unconscionability. *Carter v. SSC Odin Operating Co., LLC*, 2012 IL 113204, ¶ 18. " 'Procedural unconscionability refers to a situation where a term is so difficult to find, read, or understand that the plaintiff cannot fairly be said to have been aware he was agreeing to it ***.' " *Kinkel*, 223 Ill. 2d at 22 (quoting *Razor v. Hyundai Motor America*, 222 Ill. 2d 75, 101 (2006)). It "consists of an impropriety during the process of contract formation that deprives a party of meaningful choice." *Sanders v. Oakbrook Healthcare Center, Ltd.*, 2022 IL App (1st) 221347, ¶ 13 (citing *Phoenix Insurance Co. v. Rosen*, 242 Ill. 2d 48, 60 (2011)). On review, we consider " 'all the circumstances surrounding the transaction including

[4] Because we conclude that a contract was formed on this basis, we need not address the Cubs' alternative arguments regarding apparent authority and equitable estoppel.

the manner in which the contract was entered into, whether each party had a reasonable opportunity to understand the terms of the contract, and whether important terms were hidden in a maze of fine print; both the conspicuousness of the clause and the negotiations are important, albeit not conclusive factors ***.' " *Kinkel*, 223 Ill. 2d at 23 (quoting *Frank's Maintenance & Engineering, Inc. v. C.A. Roberts Co.*, 86 Ill. App. 3d 980, 989-90 (1980)).

¶ 44 Plaintiff argues that the arbitration provision is procedurally unconscionable because the "word 'arbitration' does not appear anywhere on the credential," the website referenced on the credential containing the full Terms and Conditions is "tiny" and is in "the same font and color as the rest of the language on the credential," and, instead of taking the user visiting MLBPressbox.com directly to the Terms and Conditions, the user was required to "click through another web page to reveal the six page, 25-paragraph boilerplate contract containing an arbitration provision buried at paragraph 22."

¶ 45 Plaintiff relies on *Zuniga*, 2021 IL App (1st) 201264, to support his argument that the arbitration provision is procedurally unconscionable. In *Zuniga*, the plaintiff sued the MLB and the Cubs after being hit in the face by a foul ball during a baseball game at Wrigley Field. *Id.* ¶ 3. Plaintiff received the ticket from her father, who had won it in a raffle. *Id.* The front of the ticket stated in small print, " 'Subject to terms/conditions set forth on the reverse side.' " *Id.* About one-third of the space on the reverse side was devoted to an advertisement. *Id.* ¶ 4. The remaining space contained "six paragraphs of fine print," stating, " 'By using this ticket, ticket holder ("*Holder*") agrees to the terms and conditions available at www.cubs.com/ticketback (the *"Agreement"*), also available at the Chicago Cubs administrative office.' "*Id.* The fifth paragraph provided in "regular type" that, " 'Any dispute/controversy/claim arising out

of/relating to this license/these terms shall be resolved by binding arbitration ***.' " *Id.* Plaintiff claimed that she never read the fine print on the back of the ticket. *Id.* ¶ 5.

¶ 46 The defendants moved to compel arbitration. *Id.* ¶ 8. Plaintiff did not dispute that a contract existed but argued that the arbitration provision was unconscionable. *Id.* The trial court agreed and denied defendants' motion. *Id.* ¶ 9. This court affirmed on appeal, finding that multiple factors "make the arbitration provision difficult or onerous to find or obtain at the time of using the ticket, such that we cannot fairly say that the plaintiff was aware of what she was agreeing to." *Id.* ¶ 21. Specifically, the ticket "merely contained a summary of the terms and conditions" and the ticket holder, "who is quite likely in the commotion outside the baseball stadium at the time he or she looks at the ticket, would then need to use a device to access the internet, manually type in the website address, and then read on that device the terms and conditions ***." *Id.* The ticket holder may not even have "a cellular phone with Internet access or coverage sufficient to access the Internet at the ballpark ***." *Id.*

¶ 47 The court also found that the "likelihood that a ticket holder will actually find, obtain, and read the full arbitration provision by accessing the Cubs' website or visiting the administrative office is diminished even further" because "minimal effort is made on the ticket itself to draw a ticket holder's attention to the need to do one of these things to understand that they are agreeing to binding arbitration by using the ticket to enter Wrigley Field." *Id.* ¶ 22. The notice on the front side of the ticket was in "very small type," the reverse side only contained a "summary of the terms and conditions," and the website was "in plain type and not set apart in underlined, bolded, italicized, or different-colored type." *Id.* ¶¶ 22-23. These factors would not "caus[e] a reasonable consumer in the plaintiff's position to learn of and read the full arbitration provision ***." *Id.* ¶ 25.

¶ 48 Similarly, here, the website containing the full Terms and Conditions was listed in the last paragraph on the reverse side of the credential and was not highlighted in any way. Whereas the back of the ticket in *Zuniga* at least mentioned "arbitration," here, plaintiff had to jump through many hoops before learning that he was agreeing to arbitration by using his media credential. Logging onto MLBPressbox.com required using a device with Internet access. Next, plaintiff had to locate a specific hyperlink entitled "Credential Terms & Conditions," amongst multiple other hyperlinks on the MLBPressbox website. Even after locating the correct hyperlink, plaintiff was still unable to discover the arbitration provision without first wading through 22 paragraphs of Terms and Conditions. The arbitration provision is "buried" in the 22nd paragraph of the 25-paragraph agreement. Taken as a whole, nothing about these circumstances brought the need to "learn of and read" the arbitration provision to plaintiff's attention. See *id.* ¶ 25. Additionally, unlike in cases involving a signed contract or internet transaction, where the full terms and conditions are brought directly to the party's attention, the contract here was formed through plaintiff's conduct of using his media credential to access Wrigley Field. See *id.* ¶¶ 27-28. As in *Zuniga*, "minimal effort is made on the [credential] itself" to draw plaintiff's attention to the need to do certain things "in order to understand that [he was] agreeing to arbitration by using the [credential] to enter Wrigley Field." See *id.* ¶ 22.

¶ 49 The Cubs argue that, in contrast to *Zuniga*, plaintiff would not have had to become aware of the arbitration provision during the "commotion" of a baseball game, since he possessed the credential for over three months prior to the accident. Even so, whether plaintiff had a "reasonable opportunity to understand the terms of the contract" is just one factor relevant to procedural unconscionability. (Internal quotation marks omitted.) See *Kinkel*, 223 Ill. 2d at 23; see also *Zuniga*, 2021 IL App (1st) 201264, ¶ 36 (refusing to "elevat[e] the less important issue

of [plaintiff's] ability to read the ticket or the website over the more important question of *whether the circumstances brought to the plaintiff's attention the need to do so* in order to become aware of the fact that she was giving up important legal rights by using the ticket ***" (emphasis added)). Rather, we must consider *all* of the circumstances surrounding the contract's formation. *Frank's Maintenance*, 86 Ill. App. 3d at 989-90. As previously discussed, considering all of the circumstances in this case, plaintiff "cannot fairly be said to have been aware that he *** was agreeing" to binding arbitration through the use of the media credential. See *Zuniga*, 2021 IL App (1st) 201264, ¶ 14 (citing *Kinkel*, 223 Ill. 2d at 22).

¶ 50 Plaintiff also argues that the arbitration provision is substantively unconscionable. "Substantive unconscionability concerns the actual terms of the contract and examines the relative fairness of the obligations assumed." (Internal quotation marks omitted.) *Kinkel*, 223 Ill. 2d at 28. It may be found where "contract terms [are] so one-sided as to oppress or unfairly surprise an innocent party" or there is "an overall imbalance in the obligations and rights imposed by the bargain." (Internal quotation marks omitted.) *Id.*

¶ 51 The court in *Zuniga* found a "degree of substantive unconscionability" because the arbitration provision allowed an "injured person an unreasonably short period of only seven days to opt out of arbitration and require[d] that the ticket holder 'must' include an account number in the request to opt out," which the plaintiff did not have. *Zuniga*, 2021 IL App (1st) 201264, ¶ 38. The plaintiff also suffered from an eye-related injury that prevented her from reading during the opt-out period. *Id.* While plaintiff here did not suffer from an eye-related injury, he was hospitalized during the seven-day opt-out period and did not possess an account number. This degree of substantive unconscionability further supports our finding that the arbitration provision is unenforceable. See *id.* ("degree of substantive unconscionability" supported finding that

arbitration provision was unenforceable); see also *Razor*, 222 Ill. 2d at 622 (a contract term can be invalidated based on a combination of procedural and substantive unconscionability). Accordingly, we reverse the trial court's judgment granting defendant's motion to dismiss and compel arbitration.

¶ 52 CONCLUSION

¶ 53 For the foregoing reasons, the judgment of the circuit court of Cook County is reversed and the cause remanded for further proceedings consistent with this order.

¶ 54 Reversed and remanded.