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Commercial division update: Unconscionability remains a narrow shield against contract enforcement

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Unconscionability is one of the oldest equitable doctrines available to a party resisting enforcement of a contract, yet New York courts—recognizing the commercial importance of enforcing written contracts—have long insisted that it operates within tight boundaries.

A party invoking the doctrine must show both that the process of contract formation was tainted and that the resulting terms are unfair. Recent Commercial Division decisions confirm that this framework remains difficult to satisfy.

Governing framework

An unconscionable contract is one that is "so grossly unreasonable as to be unenforceable [sic] because of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *King v. Fox*, 7 N.Y.3d 181, 191 (2006) (citing *Gillman v. Chase Manhattan Bank*, 73 N.Y.2d 1, 10 (1988)).

The New York Court of Appeals has long required a showing of both procedural and substantive unconscionability at the time the contract was made. *Gillman v. Chase Manhattan Bank*, N.A., 73 N.Y.2d 1, 10 (1988).

Procedural unconscionability looks to the formation process: "The focus is on such matters as the size and commercial setting of the transaction, whether deceptive or high-pressured tactics were employed, the use of fine print in the contract, the experience and education of the party claiming unconscionability, and whether there was disparity in bargaining power."

On the other hand, substantive unconscionability asks whether "one or more key terms are unreasonably favorable to one party." *Sablosky v. Edward S. Gordon Co.*, 73 N.Y.2d 133, 138 (1989) (citing *People v. Two Wheel Corp.*, 71 N.Y.2d 693, 699 (1988)). Against this backdrop, it is unsurprising that the defense of unconscionability is rarely successful.

Merchant cash advance agreements

Merchant cash advance transactions have produced the Commercial Division's most developed unconscionability analyses, given their business model that advances funds to cashstrapped merchants against future receivables, often at effective rates far above any lawful ceiling.

In *People by James v. Richmond Cap. Group LLC*, 2023 N.Y. Slip Op. 50975(U) (N.Y. Co. Sept. 15, 2023), the New York Attorney General brought a special proceeding against a group of merchant cash advance funders challenging the validity of their merchant cash advance agreements.

Following a seven-day trial, Justice Andrew Borrok of the New York County Commercial Division found those agreements to be both procedurally and substantively unconscionable. Procedurally, the funders' advertising targeted borrowers who were cash-strapped, could not obtain traditional financing, and had no meaningful alternative.

The funders also required borrowers to sign loan documents before disclosing how much they would actually fund or what the true fees would be, with those terms disclosed on a "funding call," which only occurred after signing.

The loan documents themselves were, in the court's words, "a complete cover-up," designed to disguise a lending transaction as a purchase of receivables, including precatory language falsely stating the transaction was "not a loan," and provisions that put borrowers in default from day one by requiring representations the funders knew to be false.

Substantively, the court found that the funders were "loan sharks" who charged "criminally usurious interest."

Similarly, in *Samson MCA LLC v. DI Construction LLC*, 2026 N.Y. Slip Op. 50732(U) (Monroe Co. May 5, 2026), a merchant defaulted on a $798,000 advance agreement and entered a stipulation of settlement fixing the amount owed at $457,442, which included $105,563 in attorneys' fees. When the merchant defaulted on the stipulation too, the funder sought a default judgment adding a further $113,453 in attorneys' fees, calculated at 25% of the remaining balance, for a total amount of $219,017 in attorneys' fees on an unpaid principal of $348,252.

Justice Daniel Doyle of the Monroe County Commercial Division denied the funder's motion to enforce a stipulated settlement, finding the stipulation both procedurally and substantively unconscionable.

Procedurally, the court pointed to "the high pressure tactics of the merchant advance industry, coupled with being faced with a lawsuit brought against defendants in a different jurisdiction," which created "an atmosphere inconsistent with the formation of a valid contract between parties enjoying equal bargaining power."

Substantively, the court explained that the stacked attorneys' fee provisions amounted to an agreement that "no promisor (absent delusion) would make on the one hand and no honest and fair promisee would accept on the other," and found that both the underlying agreement and stipulation of settlement "run afoul of this law."

Other contexts

Outside the merchant cash advance context, the unconscionability defense has fared far less well, even where the transaction, in hindsight, appears to have strongly favored one side.

In *Norman Realty & Constr. Corp. v. 151 East 170th Lender LLC*, 2022 N.Y. Slip Op. 50212(U), at *1 (Bronx Co. Mar. 21, 2022), a borrower facing foreclosure on consolidated mortgage loans asserted unconscionability as an affirmative claim. The lender moved for summary judgment and the court made short work of the claim, holding that "unconscionability can only be asserted as a defense to the enforcement of a contract and not as a claim for money damages."

However, even if framed as a defense, Justice Fidel Gomez of the Bronx County Commercial Division noted that the defense would have failed, reasoning that the borrower was represented by counsel throughout, had acknowledged in the loan documents that the lender "engages in the business of real estate financings and other real estate transactions and investments," and had waived all defenses in the restated note.

A comparable result followed in *Est. of Collins v. Tabs Motors of Valley Stream Corp.*, 2021 N.Y. Slip Op. 51127(U) (N.Y. Co. Nov. 23, 2021), in which minority shareholders resisted enforcement of a buy-sell provision triggered by a dissolution petition, arguing that the agreement was unconscionable.

Justice Robert Reed of the New York County Commercial Division rejected the argument, finding no procedural unconscionability because the shareholders had eighteen months to consult independent counsel before signing the agreement.

Substantively, the court found the agreement did not unreasonably favor the majority shareholder. Rather, the agreement applied equally to any shareholder who

petitioned for dissolution and the fixed share price was fair rather than deeply discounted, running nearly double the company's appraised value two years earlier. Thus, the court found no unconscionability and ordered specific performance of the buy-sell provision.

Mme. Pirie's Inc. v. Keto Ventures, LLC, 2016 N.Y. Slip Op. 50159(U) (Albany Co. Feb. 5, 2016), shows just how narrow the doctrine's reach is, even on sympathetic facts. There, a young, inexperienced buyer purchased a small retail business from her former employer, financing much of the price through a promissory note secured by the business's assets. After the buyer's untimely death, her estate resisted enforcement.

The estate argued the seller had exploited the buyer's inexperience and personal difficulties to induce the purchase for an excessive price. Justice Richard Platkin of the Albany County Commercial Division acknowledged the record provided "some support" for that characterization, but found nothing "conscience-shocking in the sale of an ongoing, profitable enterprise for less than four times the annual income and other financial benefits derivable from the business."

The court found that there was no evidence the buyer had been deprived of meaningful choice. As the court explained, the purchase "may have been an improvident decision for an unsophisticated young woman with limited business experience and her own personal troubles," but "the record provides no basis for concluding that [the buyer's] decision to purchase the Shop was anything other than the product of her free and uncoerced will."

Forum selection and real property contracts

The doctrine has also fared no better against forum-selection clauses or in real property disputes. In *Somerset Fine Home Building v. Simplex Indus., Inc.*, 2018 N.Y. Slip Op. 51845(U) (Suffolk Co. Dec. 14, 2018), a home builder challenged a forum-selection clause requiring it to litigate the underlying dispute in Pennsylvania rather than New York, arguing that the parties' agreement was unconscionable. Justice Elizabeth Emerson of the Suffolk County Commercial Division disagreed, noting the forum-selection clause appeared in the "same size print as the rest of the agreement[,]…each page of which has been initialed by the plaintiff's principal[,]" both "parties acknowledged in the agreement that they had the opportunity to obtain the assistance of counsel in the negotiation, drafting, and execution of the agreement[,]" and the agreement was "the product[] of an arm's-length business agreement." Thus, the court found that the agreement was "not so outrageous and oppressive as to warrant a finding of unconscionability."

In *Herzog v. Belizario*, 2016 N.Y. Slip Op. 26073 (Kings Co. Mar. 11, 2016), sellers of a three-family residence sought a declaratory judgment that their contract of sale was unconscionable and resisted the purchasers' motion for specific performance on that basis.

Procedurally, the sellers argued they lacked meaningful choice because their own broker had used fraudulent, high-pressure tactics, falsely telling them the property was in foreclosure and that they would lose it if they did not sell immediately. Substantively, they argued the $680,000 price was unreasonably unfavorable because, after paying prospective closing costs of $746,057, they would owe roughly $20,000 out of pocket to deliver clear title.

Justice Carolyn Demarest of the Kings County Commercial Division rejected the defense on both prongs. Procedurally, the court found no unconscionability, reasoning that any pressure exerted by the sellers' own broker could not be attributed to the purchasers, who had no relationship with the broker beyond his having found them as buyers.

Substantively, the court found no unconscionability because the sellers offered no appraisal or other evidence that $680,000 was unreasonable for the property's value, and because the bulk of the shortfall was the product of the sellers' own five years of missed mortgage payments while they continued collecting rental income, a circumstance "independent of the value of the property" and of their own making.

Conclusion

Taken together, these decisions confirm that unconscionability remains a demanding, fact-intensive defense in the Commercial Division, available only in the rare case combining a compromised bargaining process with terms no reasonable party would accept.

The doctrine has shown real teeth in the merchant cash advance space, where courts have policed predatory lending and stacked attorneys' fee provisions imposed on defaulting merchants. Outside that context, however, courts have consistently declined to relieve sophisticated or counseled parties from bargains that, in retrospect, may look improvident or one-sided.

The lesson for practitioners is that unconscionability is not a vehicle for correcting a bad deal, but a narrow safeguard reserved for the rare transaction that offends basic notions of fair dealing at its inception.

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