REVERSED and REMANDED and Opinion Filed June 4, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00669-CV

HOMEADVISOR, INC. AND ANGI HOMESERVICES INC., Appellants
V.
ZAK WADDELL AND ELIZABETH WADDELL, BEN JONES AND PAMELA JONES, DARLA WISDOM, LARA ORLIC AND DAN ORLIC, CHARLES HODGE AND KARSIN HODGE, CLARESSA WASHINGTON AND KINDALL WASHINGTON, PAULA CHANDLER, STEVE KUSTERS, KENNETH SEWELL, KIMBERLY MILLER, POOYA FORGHANI AND AZADEH BAVAFA, BELINDA LAVENDER, AND PATTI PAGELS, Appellees

On Appeal from the 162nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-18-06796

MEMORANDUM OPINION

Before Justices Myers, Whitehill, and Reichek
Opinion by Justice Reichek

HomeAdvisor, Inc. and ANGI Homeservices, Inc. (collectively "HomeAdvisor") bring this interlocutory appeal challenging the trial court's denial of their motion to compel arbitration. In two issues, HomeAdvisor generally contends the trial court erred in denying the motion to compel because (1) there is a valid agreement to arbitrate between HomeAdvisor and appellees, (2) the claims

asserted in this suit fall within the scope of that agreement, and (3) appellees failed to prove any defense to enforcement of the agreement. With respect to the latter two contentions, HomeAdvisor additionally argues those matters were delegated by the parties' agreement to an arbitrator for determination. We agree with HomeAdvisor. Accordingly, we reverse the trial court's order denying the motion to compel and remand the cause with instructions to order the parties to arbitration and stay the underlying case pending the outcome of the arbitration.

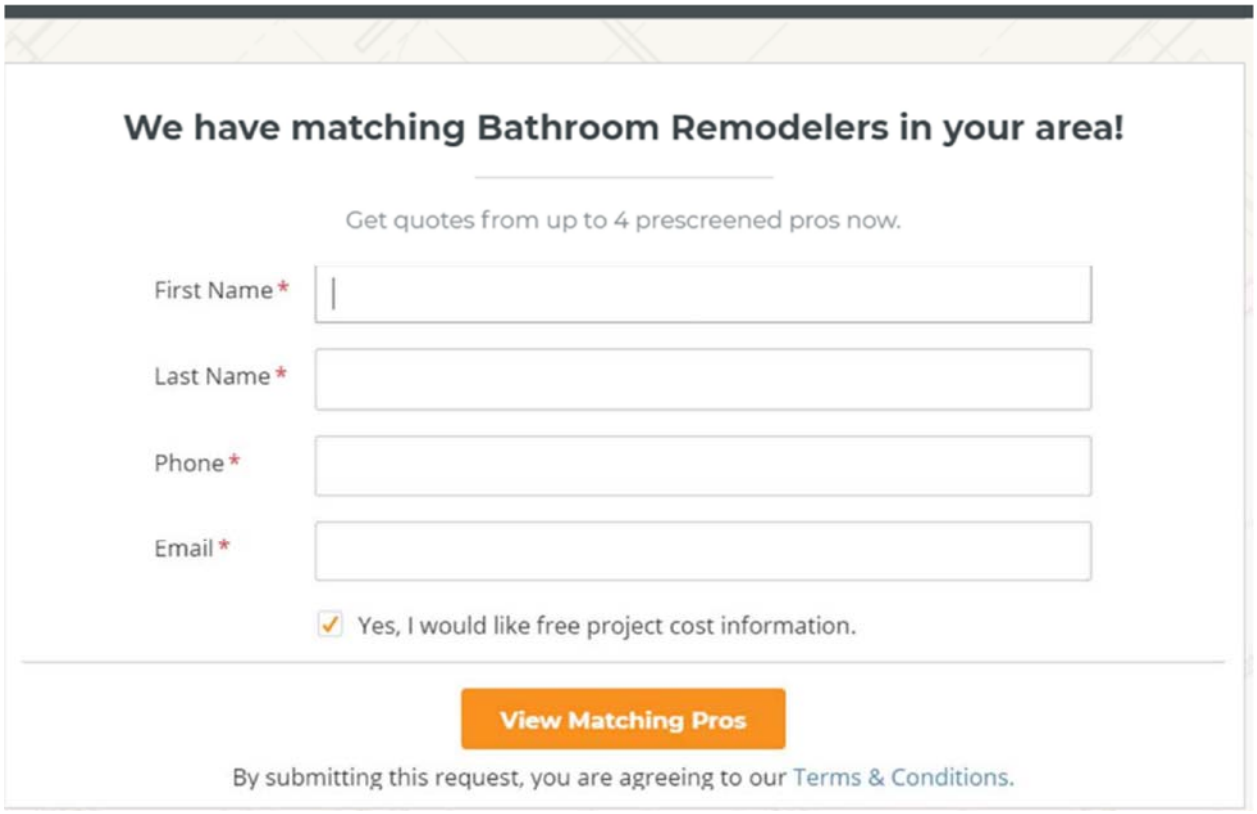
Background

HomeAdvisor operates a website that allows consumers to obtain information about home improvement projects and local home service professionals including residential construction contractors. Appellees Zak Waddell, Elizabeth Waddell, Ben Jones, Pamela Jones, Darla Wisdom, Lara Orlic, Dan Orlic, Charles Hodge, Karsin Hodge, Claressa Washington, Kindall Washington, Paula Chandler, Steve Kusters, Kenneth Sewell, Kimberly Miller, Pooya Forghani, Azadeh Bavafa, Belinda Lavender, and Patti Pagels are homeowners who sought referrals through the HomeAdvisor website for contractors to perform remodeling work on their homes. According to appellees' second amended petition, each of them entered into a home remodeling agreement with a contractor they found through the HomeAdvisor website and, in each case, the contractor abandoned the job before it was completed. Appellees alleged they made complaints to HomeAdvisor about the contractors referred to them through the website and their complaints were ignored.

Appellees brought this suit against the various contractors and their companies, asserting claims for conspiracy, breach of contract, fraud, and violations of the Texas Deceptive Trade Practices Act ("DTPA"). Appellees additionally brought claims against HomeAdvisor for violations of the DTPA based on allegedly deceptive representations made on the company's website and in its advertising.

HomeAdvisor filed a motion to compel arbitration of the claims against it, arguing appellees agreed to arbitrate any dispute with the company relating to the use of HomeAdvisor's website or services. Attached to the motion was the declaration of Chris Kucharski, HomeAdvisor's vice president of software development. Kucharski's job duties included establishing and carrying out the procedures and protocols related to HomeAdvisor's website and its contents.

Kucharski stated HomeAdvisor's business records showed that each of appellees created an account with HomeAdvisor and submitted service requests through HomeAdvisor's website. Kucharski explained that, to complete the submission of a service request, a consumer must answer questions on a series of "interview pages" before proceeding to a final "submit page." At all relevant times, the submittal page included an express advisement to consumers that their use of HomeAdvisor's services was subject to their agreement to HomeAdvisor's terms and conditions. Attached to Kucharski's declaration were screen shots of the submittal pages each appellee would have viewed before submitting their service requests. All the pages looked virtually identical to the one pictured below.



Kucharski stated that the only way to submit a service request and obtain referrals from HomeAdvisor was to affirmatively click the orange "submit button," immediately below which the consumer was advised that, by submitting a request for referrals, they were agreeing to HomeAdvisor's terms and conditions. The phrase "Terms & Conditions" was in blue text indicating it was a hyperlink that, if clicked, took the consumer to a webpage containing the terms and conditions pursuant to which they were receiving HomeAdvisor's referral services. Kucharski stated that, in addition to the submit page, there was a hyperlink to HomeAdvisor's terms and conditions on "nearly every webpage" of the company's website.

Also attached to Kucharski's declaration were copies of the terms and conditions in effect when each of the appellees submitted their service requests.

Each version of the terms and conditions in effect during the relevant time period contained the following provision:

> **ARBITRATION AND GOVERNING LAW**
>
> The exclusive means of resolving any dispute between you and HomeAdvisor or any claim made by you or HomeAdvisor arising out of or relating to your use of this Website and/or HomeAdvisor's services (including any alleged breach of these Terms and Conditions) shall be **BINDING ARBITRATION** administered by the American Arbitration Association. The one exception to the exclusivity of arbitration is that you have the right to bring an individual claim against HomeAdvisor in a small-claims court of competent jurisdiction OR EXCEPT AS EXPRESSLY PROVIDED BY APPLICABLE FEDERAL OR STATE LAW. But whether you choose arbitration or small-claims court, you may not under any circumstances commence or maintain against HomeAdvisor any class action, class arbitration, or other representative action or proceeding.
>
> ***NOTICE OF RIGHTS***
>
> a. By using the Website and/or HomeAdvisor's services in any manner, you agree to the above arbitration agreement. In doing so, **YOU GIVE UP YOUR RIGHT TO GO TO COURT** to assert or defend any claims between you and HomeAdvisor (except for matters that may be taken to small claims court). **YOU ALSO GIVE UP YOUR RIGHT TO PARTICIPATE IN A CLASS ACTION OR OTHER CLASS PROCEEDING.** Your rights will be determined by a **NEUTRAL ARBITRATOR, NOT A JUDGE OR JURY.** You are entitled to a fair hearing before the arbitrator. The arbitrator can grant any relief that a court can, but you should note that arbitration proceedings are usually simpler and more streamlined than trials and other judicial proceedings. Decisions by the arbitrator are enforceable in court and may be overturned by a court only for very limited reasons. For details on the arbitration process, see our Arbitration Procedures.

The provision further stated that "this arbitration agreement shall be governed by the Federal Arbitration Act ["FAA"]. As with the phrase "Terms & Conditions", the phrase "Arbitration Procedures" was in blue text indicating it was a hyperlink to a webpage where the consumer could view the details of the arbitration process. HomeAdvisor's arbitration procedures specified the arbitration would be administered by the American Arbitration Association ("AAA") and, unless modified by HomeAdvisor's arbitration procedures, governed by the AAA's Commercial Arbitration Rules. A hyperlink was provided to the AAA's rules and fees. Rule 7(a) states "[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 or to the arbitrability of any claim or counterclaim."

Based on the facts asserted in Kucharski's declaration, HomeAdvisor contended appellees had all affirmatively agreed to submit their claims to arbitration by submitting service requests after being expressly advised of the contractual implications of doing so. HomeAdvisor further argued the only issue to be determined by the trial court was whether an arbitration agreement existed because, under the AAA's commercial arbitration rules, all issues of arbitrability were delegated to the arbitrator. Accordingly, issues such as whether appellees' claims fell within the scope of the agreement and any defenses to arbitration they might assert were to be determined by the arbitrator. Finally, HomeAdvisor argued there

was no legitimate dispute that appellees' DTPA claims comprised a dispute arising out of or related to appellees' use of the HomeAdvisor's website and services.

In response, appellees contended the arbitration provision relied upon by HomeAdvisor was unenforceable due to a lack of contractual assent and the doctrine of unconscionability. With respect to contractual assent, appellees argued the reference to HomeAdvisor's terms and conditions at the bottom of the submittal page was inconspicuous and there was no evidence any of them actually saw it. Appellees also contended Kucharski's declaration was "defective" because it failed to attach the "original and submitted service requests" submitted by the appellees.

Several weeks later, appellees filed a supplemental response to HomeAdvisor's motion to dismiss attaching affidavits of four of the appellees. All four affidavits were largely identical. In all four the affiant stated,

> I thereafter contacted HomeAdvisor through its website and ultimately made a submittal for one of the contractors referred by HomeAdvisor. In making the submittal, I completed the information contained on the Submittal Page and pushed the "Submit" button. I did not at that point or at any other point where I was viewing the HomeAdvisor website, notice that there was a hyperlink at the bottom of the page referring to the Terms and Conditions on its website. I have reviewed the Submittal Page and find that the size of the print and clarity of the reference at the bottom of the page is inconspicuous. It went unnoticed by me and I presume by many others who submitted service request on the HomeAdvisor website.
>
> Consequently, I did not review the Terms and Conditions on HomeAdvisor's website, either when I clicked the "Submit" button or at any other time during the submittal process. Had I had a reasonable opportunity to review the Terms and Conditions, I would not have taken the referral. I did not know that the Terms and Conditions contained

> many onerous and harsh provisions which would purport to restrict any legal claims that I may have.

HomeAdvisor filed a motion to strike portions of appellees' affidavits arguing many of the statements were subjective opinion, irrelevant, not based on personal knowledge, conclusory, or constituted inadmissible hearsay. The trial court never ruled on this motion.

Following a hearing, the trial court denied HomeAdvisor's motion to compel arbitration. HomeAdvisor filed a request for findings of fact and conclusions of law, but the trial court affirmatively stated it would not issue any. HomeAdvisor then brought this appeal.

Analysis

In its first issue, Home Advisor contends the trial court erred in denying its motion to compel arbitration because the uncontroverted evidence showed there was a valid arbitration agreement between the parties. The FAA[1] reflects a liberal policy favoring arbitration agreements and states that a written provision in a contract to settle controversies arising out of the contract by arbitration "shall be valid, irrevocable, and enforceable." 9 U.S.C. §2; *Meyer v. Uber Techs., Inc.* 868 F.3d 66, 73 (2nd Cir. 2017). But when a party seeks to compel arbitration based on a contract, the first question is whether there is a contract between the parties at all. *Arnold v. HomeAway, Inc.*, 890 F.3d 546, 550 (5th Cir. 2018). "Under Texas law, a binding

[1] Appellees do not dispute that the FAA applies in this case.

contract requires: (1) an offer; (2) acceptance in strict compliance with the terms of the offer; (3) a meeting of the minds (mutual assent); (4) each party's consent to the terms; and (5) execution and delivery of the contract with intent that it be mutual and binding." *Phillips v. Neutron Holdings, Inc.*, No. 3:18-CV-3382-S, 2019 WL 4861435, at *3 (N.D. Tex. Oct. 2, 2019). In this case, appellees have contended there was no meeting of the minds because the evidence was insufficient to show they assented to the arbitration provision.

We may determine an agreement to arbitrate exists where notice of the arbitration provision was reasonably conspicuous and manifestation of assent is unambiguous as a matter of law. *Meyer*, 868 F.3d at 76. Appellees have admitted they filled in the required information on HomeAdvisor's submittal page and clicked the "submit" button. In addition, appellees do not dispute that the submittal pages appeared exactly as depicted in the screenshots attached to Kucharski's declaration.[2] Appellees state only that the hyperlink to HomeAdvisor's terms and conditions "went unnoticed" by them and they found "the size of the print and clarity of the reference" to be "inconspicuous." Whether or not a term or provision in an agreement is conspicuous is a question of law for the court, however, not a question

[2] Although appellees contended Kucharski's declaration was insufficient because it did not attach copies of the actual service requests submitted by appellees, transaction-specific evidence is not necessary where there is evidence to show how the submittal pages would have appeared on the dates in question and the non-movants have produced no contrary evidence. *See In re Online Travel*, 953 F.Supp.2d 713, 718 (N.D. Tex. 2013).

of fact. *See Littlefield v. Schafer*, 955 S.W.2d 272, 274 (Tex. 1997); *American Home Shield Corp. v. Lahorgue*, 201 S.W.3d 181, 184 (Tex. App.—Dallas 2006, pet. denied). Accordingly, the determination of whether the submittal page gave appellees reasonable notice of HomeAdvisor's terms and conditions is a legal determination we review de novo. *See Schlumberger Tech. Corp. v. Baker Hughes Inc.*, 355 S.W.3d 791, 800 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (where appeal from denial of motion to compel arbitration turns on a legal determination we apply de novo standard).

As would be expected, the conspicuousness and binding nature of a website's terms and conditions has been the subject of extensive litigation nationwide. Website user agreements generally have been separated into three categories: "clickwrap" agreements, "browsewrap" agreements, and "sign-in-wrap" agreements. *See Phillips*, 2019 WL 4861435, at *3–4. The user agreement in this case falls into the last category. A sign-in-wrap agreement notifies the user of the existence of the website's terms and conditions and advises the user that he or she is agreeing to the terms when registering an account or signing up. *Id*. at *4. Courts typically enforce sign-in-wrap agreements when notice of the existence of the terms was "reasonably conspicuous." *Id*.

In determining whether the terms of a website agreement are conspicuous, we consider the website from the perspective of a reasonably prudent computer or smartphone user. *See Meyer*, 868 F.3d at 77. It is not necessary that the agreement's

terms be on the same webpage through which the user indicates his or her assent; it is enough that the page contains a conspicuous hyperlink. *See Fteja v. Facebook*, 841 F.Supp.2d 829, 839 (S.D.N.Y. 2012). Here, the submittal page was uncluttered, with only a few spaces to enter information, and a large orange submit button with the phrase "By submitting this request, you are agreeing to our Terms & Conditions" written directly underneath. The text with the hyperlink to the terms and conditions is dark against a bright white background, clearly legible, and the same size as the nearly all of the text on the screen. The entire screen is visible at once with no scrolling necessary. The hyperlink may be clicked, and the terms of the agreement may be viewed, before the user submits a request for service. Although the terms of service are lengthy, the arbitration provision is prominently noted with bolded and capitalized print. There is nothing misleading or confusing about HomeAdvisor's presentation of its user agreement. Similar presentations have consistently been found to be conspicuous and to put the website user on inquiry/constructive notice of the website's terms of service. *See id*.; *Meyer*, 868 F.3d at 79; *Phillips*. 219 WL 4861435, at *5. Indeed, more cluttered and complicated sign-in-wrap screens have been found to provide sufficient notice. *See May v. Expedia, Inc.*, No. A-16-CV-1211-RP, 2018 WL 4343445, at *3 (W.D. Tex. 2018). Accordingly, we conclude HomeAdvisor's submittal screen gave appellees reasonably conspicuous notice of the company's terms of service, including the arbitration provision.

We further conclude that appellees' assent to HomeAdvisor's terms of service was unambiguous as a matter of law. The mechanism for manifesting assent – clicking the submit button – is temporally coupled with the website user's receipt of the company's services and the user is clearly advised that clicking the submit button indicates such assent. In other words, the reasonably prudent user would have understood that they could only receive HomeAdvisor's referral services by agreeing to the company's terms and conditions. *See Meyer*, 868 F.3d at 79–80. Based on the foregoing, we conclude an agreement to arbitrate exists between HomeAdvisor and appellees.

Appellees contend that, even if an agreement to arbitrate exists, the agreement as a whole is unenforceable because it is unconscionable. We note that challenges to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006). But even if appellees' contentions could be read as a challenge to the arbitration provision, all issues of arbitrability, including defenses to arbitration such as unconscionability, were delegated to the arbitrator for determination under the terms of the agreement.

It is well settled that parties can agree to arbitrate "gateway" questions of arbitrabilty such as unconscionability. *See Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68–69 (2010); *Arnold,* 890 F.3d at 552; *Dow Roofing Sys., LLC v. Great Comm'n Baptist Church*, No. 02-16-395-CV, 2017 WL 3298264, at *3 (Tex. App.—Fort

Worth Aug. 3, 2017, pet. denied) (mem. op.) Where the parties' contract clearly and unmistakably delegates the arbitrability question to the arbitrator, the court possesses no power to decide the arbitrability issue. *Robinson v. Home Owners Mgmt. Enters., Inc.*, 590 S.W.3d 518, 532 (Tex. 2019).

In this case, the arbitration provision clearly, and in bold print, informed the website user that, by using HomeAdvisor's services, the user was giving up their right to go to court and their rights would be determined by a neutral arbitrator rather than a judge or jury. HomeAdvisor's arbitration procedures specified that any arbitration would be administered by the AAA and governed by the AAA's Commercial Arbitration Rules. The AAA rules expressly delegate the issue of arbitrability to the arbitrator. This Court and many others have held that a bilateral agreement to arbitrate under the AAA rules constitutes clear and unmistakable evidence of the parties' intent to delegate the issue of arbitrability to the arbitrator. *Arnold*, 890 F.3d at 553; *Saxa Inc. v. DFD Architecture Inc.*, 312 S.W.3d 224, 229-30 (Tex. App.—Dallas 2010, pet. denied). Appellees have made no assertion, and present no argument, that the delegation of arbitrability to the arbitrator is itself unconscionable.

Based on the foregoing, we conclude HomeAdvisor established the existence of an arbitration agreement between it and appellees. HomeAdvisor further established that all defenses to arbitration, including unconscionability and the validity of the arbitration provision, were delegated to the arbitrator. Accordingly

the trial court erred in denying HomeAdvisor's motion to compel arbitration. We resolve HomeAdvisor's first issue in its favor. Because of our resolution of this issue, it is unnecessary for us to address the remaining issues.

We reverse the trial court's order denying HomeAdvisor's motion to compel arbitration and remand the cause with instructions to order the parties to arbitration and stay the underlying case pending the outcome of the arbitration.

/Amanda L. Reichek/
AMANDA L. REICHEK
JUSTICE

190669F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

HOMEADVISOR, INC. AND ANGI HOMESERVICES INC., Appellants

No. 05-19-00669-CV V.

ZAK WADDELL AND ELIZABETH WADDELL, BEN JONES AND PAMELA JONES, DARLA WISDOM, LARA ORLIC AND DAN ORLIC, CHARLES HODGE AND KARSIN HODGE, CLARESSA WASHINGTON AND KINDALL WASHINGTON, PAULA CHANDLER, STEVE KUSTERS, KENNETH SEWELL, KIMBERLY MILLER, POOYA FORGHANI AND AZADEH BAVAFA, BELINDA LAVENDER, AND PATTI PAGELS, Appellees

On Appeal from the 162nd Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-18-06796.
Opinion delivered by Justice Reichek.
Justices Myers and Whitehill participating.

In accordance with this Court's opinion of this date, the order of the trial court denying HOMEADVISOR, INC. AND ANGI HOMESERVICES INC.'s motion to compel arbitration is **REVERSED** and this cause is **REMANDED** to the trial court to order the parties to arbitration and stay the underlying case pending the outcome of the arbitration

It is **ORDERED** that appellants HOMEADVISOR, INC. AND ANGI HOMESERVICES INC. recover their costs of this appeal from appellees ZAK WADDELL, ELIZABETH WADDELL, BEN JONES, PAMELA JONES, DARLA WISDOM, LARA ORLIC, DAN ORLIC, CHARLES HODGE, KARSIN HODGE, CLARESSA WASHINGTON, KINDALL WASHINGTON, PAULA CHANDLER, STEVE KUSTERS, KENNETH SEWELL, KIMBERLY MILLER, POOYA FORGHANI, AZADEH BAVAFA, BELINDA LAVENDER, AND PATTI PAGELS.

Judgment entered June 4, 2020