

STATE OF SOUTH CAROLINA)
)
COUNTY OF HAMPTON)
)
ROBERT H. CROSBY,)
)
Plaintiff,)
)
v.)
)
DRIVETIME CAR SALES COMPANY,)
LLC,)
)
Defendant.)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: 15-CP-25-278

ORDER

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SC Court of Appeals

This matter came before the Court on March 23, 2016, for hearing on Defendant, Drivetime Car Sales Company, LLC's ("Drivetime") Motion to Reconsider the Court's December 4, 2015 Order Denying Drivetime's Motion to Dismiss and Compel Arbitration. Present before the Court were William F. Barnes, III, counsel for Plaintiff Robert H. Crosby, and Walton J. McLeod, IV, counsel for Drivetime.

Drivetime relies on the United States Supreme Court's decision of December 14, 2015 in DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015), as "new and binding authority", for the proposition that the "FAA preempts inconsistent state laws and judicial decisions." (Mot. to Reconsider p. 2).

Plaintiff contends that the grounds noted in the Court's December 4, 2015 Order are such grounds "at law or in equity for the revocation of any contract" as contemplated by 9 U.S.C. § 2, which provides the basis of the Federal Arbitration Act ("FAA").¹

¹9 U.S.C. § 2 provides: "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

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Imburgia arose from a California case that involved a waiver of class arbitration in agreements between DIRECTV and its customers. Imburgia, 136 S. Ct. at 466. In 2005, the California Supreme Court in Discover Bank v. Superior Ct., 36 Cal. 4th 148, 113 P.3d 1100 (2005), held that waivers of class arbitration in consumer adhesion contracts were unconscionable under California law based on the California Consumers Legal Remedies Act. However, in AT&T Mobility, LLC v. Concepcion, 563 U.S. 333, 352, 131 S. Ct. 1740, 1753 (2011) the United States Supreme Court held that California's Discover Bank rule was preempted by the FAA. Imburgia, 136 S. Ct. at 464. In Concepcion the United States Supreme Court noted:

When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA. But the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration.

Concepcion, 563 U.S. at 341 (internal citations omitted).

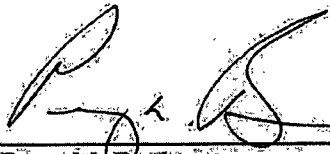
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The United States Supreme Court examined whether the California Court of Appeal's decision in Imburgia, "rest[ed] upon grounds as exist at law or in equity for the revocation of any contract." Imburgia, 136 S. Ct. at 468. The Supreme Court upheld the arbitration agreement but none of the grounds for the enforcement of the arbitration provision were a ground in law or equity to revoke a contract. Id. at 465-66. Importantly here, the United States Supreme Court in Imburgia only applied 9 U.S.C. § 2 to a specific factual pattern that is distinguishable from this case. While it may be a new case issued after this Court's December 4, 2015 Order, the Supreme Court does not change the law from Concepcion or the exception contained in 9 U.S.C. § 2.

In its December 4, 2015 Order, this Court noted that "a plaintiff cannot be held to have contemplated that, in signing the arbitration clause, he was agreeing to arbitrate claims arising from

allegedly fraudulent conduct.’ Partain, 386 S.C. at 494, 689 S.E.2d at 605.’ (Order p. 3). The Court went on to hold that Drivetime’s conduct is the type of conduct contemplated by Chassereau; (Order p. 3). Although Drivetime contends otherwise, the Court’s December 4, 2015 Order is not a state law, similar to the anti-class waiver provision in Concepcion, that conflicts with the FAA and is therefore preempted. Drivetime’s conduct, as alleged by the Complaint and analyzed in the December 4, 2015 Order is a ground that exists in law or equity for the revocation of any contract, as contained in 9 U.S.C. § 2. To hold otherwise, as advocated by Drivetime, would eliminate congress’ exception from the FAA contained in 9 U.S.C. § 2.

Considering the foregoing, Drivetime’s motion to reconsider is hereby respectfully DENIED.

IT IS SO ORDERED.



Perry M. Duckner
Judge, 14th Judicial Circuit

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Walterboro, South Carolina

April 6, 2016