

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

Marcus Kevin Grant, individually)
and in a representative capacity)
for all others similarly situated,)
)
Plaintiffs,)
)
vs.)
)
Jud Kuhn Chevrolet,)
)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO.: 15-CP-26-8921

RECEIVED

SEP 15 2017

SC Court of Appeals

ORDER COMPELLING ARBITRATION

The Defendant moved to compel Bilateral (Non-Class) Arbitration. On July 31, 2017 the Court ruled from the Bench that the case would go to arbitration with the American Arbitration Association, but reserved judgment on whether the arbitration could proceed bilaterally only or as a Class. The parties were allowed to submit supplemental briefs on the issue of bilateral versus class arbitration. The Court finds that the case may proceed as a class action in arbitration.

I. Arbitration with the AAA.

The following arbitration clause appears in the contract to purchase the vehicle:

ARBITRATION REQUIRED BY THIS AGREEMENT. The parties agree that instead of litigation in a court, any dispute, controversy or claim arising out of or relating to the sale of the motor vehicle or to this Purchase Order, including the validity or lack thereof of this contract, to any other document or agreement between the parties relating to sale of the motor vehicle, or to any other document or agreement between the parties relating to the motor vehicle, including the parties' retail installment contract, if any, shall be settled by binding arbitration administered by the American Arbitration Association, under its Commercial Arbitration Rules. Such arbitration shall be conducted in Columbia, SC. Each party will pay its own costs, and any filing fee charged by the American Arbitration Association shall be split evenly between the parties. Any judgment on the award rendered by the arbitrator may be entered in any court of competent jurisdiction.

Arbitration clauses are favored in the State and Federal Courts. When interstate commerce is involved in a transaction, State arbitration law is preempted by the Federal Arbitration Act. Nevertheless, the Federal Arbitration Act provides that an arbitration clause may be unenforceable if it is held to be unconscionable under a State's contract law. Simpson v. M.S.A. of Myrtle Beach, Inc., 373 S.C. 14, 644 S.E.2d 663 (2007). The South Carolina Supreme Court has approached adhesion contracts between a consumer and automobile retailer with "considerable skepticism." Id. An arbitration clause can be unconscionable if the expenses of arbitration as compared to the Court system are unaffordable to the Plaintiff so as to prohibit the Plaintiff from being able to vindicate his claims in arbitration. The Plaintiff must have some forum to vindicate his rights.

The Courts have recognized what is referred to as "The Effective Vindication Exception to the FAA." See Am. Express Co. v. Italian Colors Rest. ____ U.S. ____, 133 S.Ct. 2304 (2013) and Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. 473 U.S. 614 (1985). The Effective Vindication Exception to the FAA requires that an Arbitration Agreement which prohibits the use of the judicial forum must also provide for an effective and accessible alternative forum. If the Plaintiff cannot afford the alternative forum, then the arbitration clause is unconscionable and would be unenforceable under the savings clause of the FAA. The effective vindication exception to the FAA recognizes that an arbitration clause cannot work to totally deprive a Plaintiff of any forum to hear his claim. A Plaintiff must be able to vindicate his claim somewhere.

The Plaintiff claims that he cannot effectively vindicate his rights in arbitration, citing three provisions of the arbitration clause, as follows:

1. The Agreement requires the application of the Commercial Arbitration Rules of the American Arbitration Association. The Plaintiff is a consumer and purchased the vehicle for

personal use. The Plaintiff claims he cannot afford the fees under the Commercial Arbitration Rules.

2. The arbitration clause requires each party to pay its own costs. The fees charged by the AAA will be split between the parties. The filing fees and arbitrator fees under the Commercial Arbitration Rules can range from \$750 to several thousand dollars, depending on the length of the hearing and the charges of each individual arbitrator. The Plaintiff claims he cannot afford these fees.

3. The arbitration clause requires arbitration in Columbia, SC. Both the Plaintiff and Defendant are located in Horry County, South Carolina, approximately a three (3) hour drive from Columbia. The Plaintiff claims it is unreasonable and unconscionable to require consumers to travel three (3) hours to an arbitration proceeding.

The Court has considered the Affidavit of counsel setting forth the anticipated costs in arbitration of an individual claim as well as a class action. The court has also considered Affidavits attaching the Administrative Fee Schedules of the Commercial Arbitration Rules of the AAA as well as the Supplementary Rules for Class Arbitrations showing the fees for a class action filing.

In the case of Bradford v. Rockwell Semi-Conductor Systems, Inc., 238 F.3d 549 (4th Cir. 2001), the Fourth Circuit Court of Appeals ruled that evaluating whether arbitration is a financially adequate substitute to litigation will be decided on a case by case basis. The Court stated that this analysis should focus “among other things” on three issues:

The Claimants ability to pay the arbitration fees and costs, the expected cost differential between arbitration and litigation in court, and whether that cost differential is so substantial as to deter the bringing of claims. [238 F.3d at 556.]

After considering these issues as outlined by the Fourth Circuit, this Court finds that the cost differential in this case is not so substantial as to deter the bringing of this claim. Therefore, the Court finds that arbitration with the AAA is appropriate.

II. Class vs. Bilateral Arbitration.

The present case has been styled as a Class Action under the Dealers Act. The Dealers Act specifically provides for class actions. S.C. Code Ann. §56-15-110(2) provides “When such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the Court, one or more may sue for the benefit of the whole, including actions for injunctive relief.”

The South Carolina Supreme Court addressed class actions under the Dealers Act in the case of Herron v. Century BMW, 387 S.C. 525, 693 S.E.2d 394 (2010) (Herron I). The Court found that an Arbitration Agreement which prohibited class actions in direct contravention of the Dealers Act is against public policy. (Notably, there is no such class action prohibition in the arbitration clause at issue in the case before us.) The Court noted that in addition to specifically providing for class actions, the Dealers Act also provides that “Any contract or part thereof or practice thereunder in violation of any provision of this chapter shall be deemed against public policy and shall be void and unenforceable.” S.C. Code §56-15-130. The Court went on to hold, “Stated succinctly, the Legislature has made clear that the public policy of this State is to provide consumers with a non-waivable right to bring class action suits for violations of the Dealers Act and that any contract prohibiting a class action suit violates our State’s public policy and is void and unenforceable.” (Emphasis added.) The Court affirmed the Trial Court’s Order in result, denying the Motion to Compel Arbitration.

Shortly after the opinion in Herron I was issued, The United States Supreme Court published its opinion in the case of AT&T Mobility, LLC v. Concepcion, 563 U.S. 333 (2011). In Concepcion, The United States Supreme Court overturned a decision of the California Courts which invalidated a class action waiver in an arbitration provision based upon the preemption of the FAA. The United States Supreme Court then accepted certiorari on the Herron I case and remanded the Herron I case with instructions for the South Carolina Supreme Court to reconsider its opinion in Herron I in light of the Concepcion case. The South Carolina Supreme Court affirmed Herron I because the issue of preemption had not been preserved for review in the South Carolina proceedings. Herron v. Century BMW, 395 S.C. 461, 719 S.E.2d 640 (2011). (Herron II).

The arbitration agreement in Herron I contained a class action waiver. The Court struck the waiver on public policy grounds but implied that the waiver was severable and the arbitration clause could be saved. The Court struck the entire arbitration clause at the Defendant's request. The Arbitration Agreement in the present case does not have a class action waiver. Therefore, the present case is even stronger than Herron I and this Court has even more reason to deny the Respondent's request for bilateral arbitration.

In 2015, the United States Supreme Court once again overturned a California decision denying arbitration. In DirectTV v. Imburgia, 577 U.S. ____ (2015), the Court addressed an arbitration clause which contained a class action waiver with a self-defeating clause. The waiver specified that the entire arbitration provision was unenforceable if the "law of your state" made class-action waivers unenforceable. The lower court reasoned that since the law of California did not allow class action waivers, and since that rule was the "law of your state" the entire arbitration agreement was unenforceable by its own self-defeating terms. The Supreme Court disagreed,

reasoning that the lower court had asked the wrong question. The court stated, “Thus the underlying question of contract law at the time [the lower court] made its decision was whether the ‘law of your state’ included invalid California law. We must now decide whether answering that question in the affirmative is consistent with the [FAA].” (Emphasis in original.) *Id.* at ____.

Citing Concepcion, the Court concluded that the California law against class waivers was invalid because it did not place arbitration agreements on equal footing with all contracts. The California law targeted arbitration agreements. The Court held, “After examining the grounds upon which the Court of Appeal rested its decision, we conclude that California courts would not interpret contracts other than arbitration contracts the same way. Rather, several considerations lead us to conclude that the court’s interpretation of this arbitration contract is unique, restricted to that field.” *Id.* at _____. Therefore, the self-defeating clause was not triggered and the arbitration clause was valid.

The facts of the present case, however, are very different from the facts of DirecTV. The first and foremost distinction is that DirecTV and prior cases concerned the States’ attempts to defeat arbitration altogether, which would frustrate the liberal Federal Policy in favor of arbitration as set forth in the FAA. In the present case, however, the Court has already ruled in favor of arbitration. Therefore, the issue of class treatment is separate from the enforceability of the arbitration clause.

The second distinction is that the arbitration clause in the present case contains no class action waiver. Therefore, there is no conflict between the state’s public policy of allowing class actions under the Dealers Act and the FAA’s liberal policy favoring arbitration. Both of these interests can be served.

The Third distinction is that the class action provision of the Dealers Act applies to all situations which arise under the Act. It does not target arbitration as the California law did in DirecTV. The class action provision of The Dealers Act allows for a class action in any contract to purchase a vehicle, with or without an arbitration clause. The Dealers Act was adopted in 1962, long before arbitration became popular. In 1962, the South Carolina legislature could not possibly have intended to target arbitration clauses. There is no evidence in the record to suggest that arbitration clauses were used in Automobile purchase Agreements in 1962. The purpose of providing for class actions under the Dealers Act was most certainly to provide a practical economical remedy for a large group of car buyers who have suffered the same type harm. The purpose was not to defeat arbitration clauses, or to frustrate the purposes of the FAA.

In Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 559 U.S. 662 (2010), the U.S. Supreme Court held that imposing class arbitration on parties who have not agreed to authorize class arbitration was inconsistent with the Federal Arbitration Act. The Court held that the arbitration clause in Stolt-Nielsen was “silent” as to class action treatment in arbitration. In the present case, however, the arbitration clause cannot be said to be silent as to class action treatment.

In the case of Oxford Health Plans, LLC v. Sutter, 569 U.S. _____ (2013), the United States Supreme Court, in a unanimous decision, affirmed an arbitrator’s decision to allow a class action to proceed in arbitration based upon the arbitrator’s interpretation of the contract. The arbitration clause at issue stated as follows:

No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the rules of the American Arbitration Association with one Arbitrator. [Id.]

Obviously, this particular arbitration clause says nothing about class actions. Therefore, the agreement between the parties was arguably “silent” as to class actions. Nonetheless, the

arbitrator found that the intent of the arbitration clause was “to vest in the arbitration process everything that is prohibited from the Court process.” Id. The U.S. Supreme Court went on to state the Arbitrator’s reasoning as follows: “And a class action, the arbitrator continued, ‘is plainly one of the possible forms of civil action that could be brought in a Court’ absent the agreement.” Id. Accordingly, he concluded that ‘on its face, the arbitration clause... expresses the parties’ intent that class arbitration can be maintained’” Id.

The United States Supreme Court ruled that the arbitrator’s decision to allow this interpretation of the contract would not be overturned under the appellate standard of review of the Federal Arbitration Act. The Court went on to distinguish its Stolt-Nielsen decision by noting as follows: “The parties in Stolt-Nielsen had entered into an unusual stipulation that they had never reached an agreement on Class Arbitration.” Id. (emphasis added).

In the present case there is no such unusual stipulation. On the contrary, the arbitration clause in the present case anticipates that all matters which could be brought forth in a Court system could also be brought forth in arbitration, which would include class actions.

There are at least three ways in which the present arbitration clauses speak to class wide arbitration. First, the arbitration clause states that “The parties agree that instead of litigation in a court, any dispute, controversy or claim... shall be settled by binding arbitration...” (Emphasis added.) Just as the arbitrator found in Sutter, I find that the present arbitration clause “vests” in the arbitrator everything that is prohibited from the Court process.

Second, in the present case there is the added indicator that class actions are specifically provided for under the Dealers Act which has been declared to be the public policy of this state by our Courts in Heron I and Heron II.

The entire agreement between the dealer and the purchaser is subject to the provisions of the South Carolina Manufacturers, Distributors and Dealers Act (Dealers Act). The Dealers Act is very specific in terms of the rights of consumers to band together in a class action. S.C. Code Ann. §56-15-110(2) provides “When such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the Court, one or more may sue for the benefit of the whole, including actions for injunctive relief.” This is a specific consumer remedy recognizing that some losses suffered by consumers may be so small that the loss would not warrant the filing of a single action. The Dealers Act recognizes that consumers are particularly vulnerable to abusive fees charged by dealers and therefore specifically provides for consumers to band together to seek justice against these unscrupulous charges and activities.

The arbitration clauses contained in the purchase agreement in this case cannot be read separately from the requirements and the protections provided by the Dealers Act. These protections are presumed to be a part of any contract and therefore the arbitration clauses are not silent as to whether a class action can be brought in arbitration. The provisions of the Dealers Act are required in every Contract of Sale. As stated by the South Carolina Supreme Court in Herron I, the class action provision is non-waivable.

Third, the agreement specifically calls for arbitration in the AAA. The AAA specifically provides Supplementary Rules for Class Arbitrations. (See Affidavits.) The AAA is set up to handle class arbitrations. The AAA has handled numerous class arbitrations in the past and is well equipped to handle this relatively simple class action. (See AAA website)

Stolt-Nielsen indicates that there must be a contractual basis for concluding that a party agreed to class action treatment. By designating the AAA as the arbitration forum, the Defendant

dealer is charged with knowledge of the AAA rules. The AAA has provided for class action treatment in arbitrations since its rules became effective on October 8, 2003. The dealer is charged with knowledge of this provision for class treatment and it has specifically designated the AAA as the forum to handle arbitrations. Therefore, there is in fact a contractual basis for class treatment.

Conclusion

It is, therefore, ordered that this matter be stayed, pending arbitration before the AAA. The arbitrator for the AAA may treat this matter as a class action.¹

IT IS SO ORDERED.

Benjamin H. Culbertson, Circuit Court Judge
For the Fifteenth Judicial Circuit

Conway, SC
August __, 2017

¹ This Court renders no decision as to the propriety of designating this action as a class action. The ruling hereunder is that this action may be arbitrated as a class action if so designated by the arbitrator.



Horry Common Pleas

Case Caption: Marcus Kevin Grant VS Jud Kuhn Chevrolet

Case Number: 2015CP2608921

Type: Order/Stay

Presiding Circuit Judge

s/Benjamin H. Culbertson, Judge Code 2148

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