

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM JASPER COUNTY
Court of Common Pleas

SEP 25 2017

SC Court of Appeals

The Honorable Maité Murphy
Circuit Court Judge

Appellate Case No. 2017-000120
Circuit Court Case No. 2016-CP-27-269

Annalee Walsh..... Respondent,
v.
Boat-N-RV Megastore and Ridgeland Recreational Vehicles, Inc., Defendants.
of whom
Ridgeland Recreational Vehicles, Inc., d/b/a Boat-N-RV Megastore
is the..... Appellant.

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT..... 1

 I. Boat-N-RV has properly preserved the question of arbitrability for appellate review..... 1

 II. Ms. Walsh has not identified any authority to rebut Boat-N-RV’s appellate position or to support her own arguments.....3

 A. Courts have repeatedly rejected Ms. Walsh’s argument that a financing condition implicates contract formation, rather than contract performance.3

 B. The Court does not need to reach the contract formation-versus-contract performance question because the parties agreed that all disputes about the “making” of their contract would be resolved by an arbitrator.7

CONCLUSION9

TABLE OF AUTHORITIES

Cases

<i>Am. Recovery Corp. v. Computerized Thermal Imaging</i> , 96 F.3d 88 (4th Cir. 1996).....	9
<i>Champion v. Whaley</i> , 280 S.C. 116, 311 S.E.2d 404 (Ct. App. 1984).....	5, 6, 7
<i>I'On, LLC v. Town of Mt. Pleasant</i> , 338 S.C. 406, 526 S.E.2d 716 (2000)	2
<i>Mercury Dev., LLC v. Motel Sleepers, Inc.</i> , Case No. 11-147-GFVT, 2013 U.S. Dist. LEXIS 137370 (E.D. Ky. Sept. 25, 2013)	4
<i>Rent-A-Center, W., Inc. v. Jackson</i> , 561 U.S. 63 (2010)	7, 8
<i>S.C. DOT v. First Carolina Corp.</i> , 372 S.C. 295, 641 S.E.2d 903 (2007)	2
<i>Wahl v. Hutto</i> , 249 S.C. 500, 155 S.E.2d 1 (1967).....	4, 5
<i>Weiss v. Nw. Broad., Inc.</i> , 140 F. Supp. 2d 336 (D. Del. 2001).....	4
<i>Westlake Petrochemicals, LLC v. United Polychem, Inc.</i> , 688 F.3d 232 (5th Cir. 2012)	4

Statutes

9 U.S.C. § 4.....	8
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INTRODUCTION

Ms. Walsh's opposition to Boat-N-RV's appellate arguments is entirely detached from reality. In her complaint, Ms. Walsh admits that she signed the very sales contract that contains the parties' arbitration agreement. (R. p. 5; Compl. ¶ 7.) That arbitration agreement is found on Page 2 of the sales contract—the same page that begins by confirming that “Buyer [*i.e.* Ms. Walsh] has entered into this Agreement” to purchase a recreational vehicle from Boat-N-RV. (R. p. 12; Sales Contract at 2.) Likewise, the relief Ms. Walsh seeks through her complaint is to recover money that she deposited with Boat-N-RV pursuant to the contract but later forfeited due to her own breach.

Yet at both the trial level and on appeal, Ms. Walsh insists that the parties never entered into a contract, and she does so only to avoid the parties' arbitration agreement. As explained in Boat-N-RV's opening brief, this is an illusory argument that courts have rejected time after time, and Ms. Walsh has not provided a single authority to rehabilitate her empty position. The Court should reject Ms. Walsh's posturing and reverse the circuit court's denial of Boat-N-RV's motion to compel arbitration.

ARGUMENT

I. Boat-N-RV has properly preserved the question of arbitrability for appellate review.

Exposing the weakness of her position, Ms. Walsh tries to avoid dealing with the issues of this appeal by arguing at length that they have not been preserved for review. (Return Br. at 10–14.) The sole basis for her position is that Boat-N-RV did not file a Rule 59 motion after the circuit court denied its motion to compel arbitration. Ms. Walsh's procedural argument, however, is based on a fundamental misunderstanding of preservation principles.

This Court has appellate jurisdiction to address errors that appear in an order on appeal that were timely and sufficiently raised by the appellant at the trial level. *S.C. DOT v. First Carolina Corp.*, 372 S.C. 295, 301–02, 641 S.E.2d 903, 907 (2007). A Rule 59 motion is only required when a party makes an argument that is not ruled upon in a circuit court’s initial order. *I’On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

That is not the case here. The issue on appeal—whether this matter is subject to arbitration—was the sole question presented to the circuit court. Boat-N-RV explained to the circuit court that this case is subject to arbitration because:

- The parties’ sales contract contains a broad arbitration agreement, and their transaction is governed by the Federal Arbitration Act (R. pp. 13–15; Memorandum in Support of Motion to Compel Arbitration at 1–3);
- Ms. Walsh concedes in her complaint that she signed the sales contract (R. p. 15; *id.* at 3);
- The Regulation Z Disclosure Form is inadmissible parol evidence (R. pp. 15–16; *id.* at 3–4);
- Any dispute about the making of the parties’ contract falls within the scope of the arbitration agreement (R. p. 16; *id.* at 4); and
- There is no “condition precedent” to actually making the sales contract, but instead Ms. Walsh breached her own obligations under the contract (R. pp. 46–55; Objections to Proposed Order).¹

The circuit court disagreed with Boat-N-RV’s arguments, held that no contract existed between the parties, and refused to compel this matter to arbitration. (R. p. 1; Order.) Nothing more was required for Boat-N-RV to preserve the question of arbitrability for this Court’s review. Accordingly, the Court should reject Ms. Walsh’s baseless procedural objections to this appeal.

¹ Boat-N-RV filed the objections that it previously emailed to the presiding judge’s law clerk and opposing counsel two months before entry of the order on appeal. (R. p. 46.) Accordingly, Ms. Walsh’s repeated suggestion that arguments included in those emails are not part of the record and cannot be considered on appeal is just not true.

II. Ms. Walsh has not identified any authority to rebut Boat-N-RV’s appellate position or to support her own arguments.

Ms. Walsh’s substantive arguments are similarly empty. In Boat-N-RV’s opening brief, it argued that the transaction involved interstate commerce sufficient to trigger the Federal Arbitration Act, and the arbitration agreement itself was broad enough to cover both the claims alleged in Ms. Walsh’s complaint and her newfound challenge to the contract’s making. (Boat-N-RV’s Opening Br. at 6–9.) It then argued that a Regulation Z Disclosure Form cannot undo the plain language of the arbitration agreement. (*Id.* at 9–14.)

In response, Ms. Walsh flips the order of the arguments. First, she argues that the Regulation Z Disclosure Form somehow created an unsatisfied condition precedent to the formation of the parties’ sales contract—even though that disclosure form expressly confirms that the parties “have entered” into a contract for a recreational vehicle. (Return Br. at 3–8.) She then argues that the parties’ agreement to delegate gateway issues to an arbitrator should be artificially limited to disputes about the “negotiation” of their contract. (*Id.* at 8–10.) Ms. Walsh is wrong in every respect.

A. Courts have repeatedly rejected Ms. Walsh’s argument that a financing condition implicates contract formation, rather than contract performance.

There is no dispute that the parties signed a sales agreement for the purchase of a recreational vehicle; Ms. Walsh concedes this in her complaint. (R. p. 5; Compl. ¶ 7.) The sales agreement confirms that the parties have entered into a contract: “Buyer has entered into this Agreement with the Boat-N-RV dealership identified in the box checked on the top of Page 1 of this Agreement (the ‘Seller’).” (R. p. 12; Sales Contract at 2 (emphasis added).)

Ms. Walsh further concedes that, as required by the sales contract, she gave Boat-N-RV a \$25,000 down payment for the unit. (R. p. 5; Compl. ¶ 8; R. p. 11; Sales Contract at 1.)

And Ms. Walsh concedes that Boat-N-RV has returned that deposit to her, less the amount that it is entitled to keep pursuant to the parties' sales contract. (R. p. 6; Compl. ¶ 18; R. p. 11; Sales Contract at 1.)

Despite all of this, including her own partial performance, Ms. Walsh insists that the parties never entered any contract—and therefore attempts to bypass the parties' unambiguous arbitration provision—because she never got a loan to pay Boat-N-RV the remaining balance owed on the unit. The Court should reject such illusory posturing.

Courts around the country have held that a financing provision within a contract amounts to a condition precedent to contract performance, not to formation. *See generally Westlake Petrochemicals, LLC v. United Polychem, Inc.*, 688 F.3d 232, 240 (5th Cir. 2012); *Mercury Dev., LLC v. Motel Sleepers, Inc.*, Case No. 11-147-GFVT, 2013 U.S. Dist. LEXIS 137370, at *8 (E.D. Ky. Sept. 25, 2013); *Weiss v. Nw. Broad., Inc.*, 140 F. Supp. 2d 336, 344 (D. Del. 2001).²

The lone case that Ms. Walsh cites in response to this body of authority is *Wahl v. Hutto*, 249 S.C. 500, 155 S.E.2d 1 (1967). Simply put, that case has nothing to do with the issue presented here.

In *Wahl*, a property owner and a prospective buyer drew up a sales contract with the understanding that the sole purpose of that writing was to help the potential buyer get a loan. *See id.* at 504, 155 S.E.2d at 3 (explaining that both the potential seller and potential buyer testified that the purpose of creating a purported written contract was solely to facilitate a potential loan, and that no contract actually existed between them). The potential sale ultimately fell through,

² Boat-N-RV cited these cases on Pages 12 and 13 of its opening brief. In response, Ms. Walsh first states that the contract performance-versus-formation distinction highlighted in these cases was only discussed in *dicta*—which is a total mischaracterization of these authorities. (Return Br. at 8.) Ms. Walsh then claims that these cases “are not germane” because they involved “arms-length business transactions between sophisticated parties”—which is an observation that is irrelevant to the distinction between contract performance and contract formation. (*Id.*)

but a real estate broker—who was not even a party to the nonexistent sales contract—nevertheless demanded a sales commission pursuant to a separate brokerage agreement. *Id.* at 504, 155 S.E.2d at 3. The Supreme Court held that because the brokerage agreement was conditioned on a sale occurring but no sale took place, the broker was “not entitled to recover commissions for a sale.” *Id.* at 506, 155 S.E.2d at 4.

Wahl bears no resemblance to this case, and South Carolina courts have been quick to cabin *Wahl* to its peculiar facts. For instance, in *Champion v. Whaley*, 280 S.C. 116, 122–23, 311 S.E.2d 404, 407–08 (Ct. App. 1984), a realtor brought a prospective buyer to a seller that he represented. The prospective buyer and seller entered into a sales contract “conditioned on [the buyer] obtaining a 100% loan from Farmers Home Administration.” *Id.* at 118, 311 S.E.2d at 405. While that buyer was seeking her loan, the seller sold the house to a different buyer. *Id.* at 118–19, 311 S.E.2d at 405. The realtor then sued for his commission.

Just as Ms. Walsh does here, the seller in *Champion* argued that no contract existed and cited *Wahl* as authority. *Id.* at 123, 311 S.E.2d at 408. This Court readily rejected that argument based on *Wahl*’s unique facts. Instead, it held that the financing condition in the *Champion* contract was a condition of contract performance, not of formation, and that the seller could not rely on his own breach to avoid paying the realtor’s commission. It explained:

The trial judge also erred in holding the Sellers were not bound to pay the commission because negotiations were not complete between Bell [*i.e.*, the initial buyer] and the Sellers. Bell and the Sellers signed a contract of sale on December 7, 1979. At that point nothing was left to negotiate. The parties had reached a final bargain. A valid executory contract had been made, complete in all its essential terms. Only performance remained. While Bell’s duty of performance was qualified by the condition that she obtain a 100% FmHA loan, the existence and validity of the contract did not depend upon the happening of the condition.

Id. at 122, 311 S.E.2d at 407–08.

These are precisely the same circumstances that are presented here. Boat-N-RV and Ms. Walsh signed a sales contract that memorialized a meeting of the parties' minds with respect to all essential terms, including *inter alia*: (a) the recreational vehicle Ms. Walsh was purchasing, (b) the purchase price, (c) the "as-is" nature of the unit she was purchasing, (d) the vehicle she was trading in, (e) the credit she was receiving for her trade-in, (f) the money she was depositing with Boat-N-RV, (g) the amount of her deposit that she would forfeit if she canceled the contract, and (h) the amount of financing she would secure to fulfill the remainder of the purchase price. (R. p. 11; Sales Contract at 1.)³ In the *Champion Court's* words: "At that point nothing was left to negotiate. The parties had reached a final bargain." 280 S.C. at 122, 311 S.E.2d at 407.

All that remained was for the parties to perform their respective obligations: Ms. Walsh had to finish paying for the vehicle, after which Boat-N-RV would deliver it to her with good title.⁴ And Ms. Walsh even began her performance, as she admits that she gave Boat-N-RV the down payment due under the contract. (R. p. 5; Compl. ¶ 8.)

³ In her return brief, Ms. Walsh suggests that the sales contract remained unsettled because "the terms of the loan were ultimately never specified." (Return Br. at 5.) This is misleading at best. The terms of Ms. Walsh's contract with Boat-N-RV were final and agreed-upon. Any loan that she would have gotten to finish paying for the vehicle would have been the subject of a separate agreement between Ms. Walsh and a third-party lender. The fact that Ms. Walsh did not enter into a different contract with a different entity has no bearing on whether she and Boat-N-RV had a meeting of the minds with respect to their transaction.

⁴ Indeed, because Ms. Walsh had already entered into a contract and was obligated to finish paying for the vehicle, the Regulation Z Disclosure Form required her to attest: "By signing below, I acknowledge that I have entered into a written agreement to purchase a boat or recreational vehicle conditioned *only* upon the willingness of a third-party lender to finance the purchase on terms not less favorable than those set forth immediately below." (R. p. 52; Regulation Z Disclosure Form (emphasis in original).) The "condition" was Ms. Walsh's obligation to pay Boat-N-RV for the vehicle; her failure to meet that "condition" prompted Boat-N-RV to return only a portion of her deposit, just as the parties agreed in their sales contract. (R. p. 11; Sales Contract at 1.) The Regulation Z Disclosure Form even concludes by reinforcing that Ms. Walsh's failure to uphold her part of the bargain could result in "the forfeiture of any cash

Though she never got a loan to pay the balance due for the vehicle, that failure only relieved Boat-N-RV from its obligation to actually give her the coach; it did not mean, as Ms. Walsh argues and the circuit court incorrectly held, that the parties' contract never existed in the first place. *See Champion*, 280 S.C. at 122, 311 S.E.2d at 408 (“The fact that no duty of performance can arise until the happening of a condition does not make the existence of the contract depend upon its happening, unless the parties so intend [such as in *Wahl*].”). The Court should reverse the circuit court's ruling accordingly.

B. The Court does not need to reach the contract formation-versus-contract performance question because the parties agreed that all disputes about the “making” of their contract would be resolved by an arbitrator.

As explained in Boat-N-RV's opening brief, the Court does not even need to reach the “condition precedent” question because the parties indisputably agreed that any issue regarding the “making” of their sales contract would be subject to arbitration.⁵ The sales contract—again, Ms. Walsh concedes in her complaint that she signed this agreement and began her performance under it—specifically assigns gateway questions regarding the parties' sales contract to an arbitrator for resolution. (*See* R. p. 12; Sales Contract at 2 (providing that any dispute “relating to this agreement, including the making thereof, shall be resolved through binding arbitration”) (all capitals, bold, and underlined in original omitted).)

When the parties agree that such gateway questions are to be resolved by an arbitrator, the court's role is limited to sending the matter to arbitration. *See, e.g., Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 68–69 (2010) (“We have recognized that parties can agree to arbitrate

deposit placed with Boat-N-RV” pursuant to the sales contract. (R. p. 52; Regulation Z Disclosure Form.) There is simply no way that the parties do not have a contract here.

⁵ In her return brief, Ms. Walsh does not provide any rebuttal to Boat-N-RV's argument that the claims she has asserted in this litigation fall within the arbitration agreement's scope, which applies to “any claim or controversy arising out of or otherwise relating to” the sales contract. (R. p. 12; Sales Contract at 2 (all capitals, bold, and underlined in original omitted).)

‘gateway’ questions of ‘arbitrability,’ such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy.”) (emphasis added). The only exception to this rule is when a party challenges the arbitration agreement itself, rather than the contract as a whole. *See id.* at 70 (“Thus, a party’s challenge to another provision of the contract, or to the contract as a whole, does not prevent a court from enforcing a specific agreement to arbitrate.”).

Because Ms. Walsh’s attempt to avoid arbitration is based on her challenge to the parties’ sales contract as a whole, rather than a specific challenge to the arbitration agreement, her efforts to end-run the arbitration agreement should fail, and this case should be stayed so that an arbitrator can address all of the issues presented in Ms. Walsh’s complaint.

Nowhere in her return brief does Ms. Walsh address this error in the circuit court’s ruling or even respond to Boat-N-RV’s argument. Instead, she claims that the phrase “making thereof” in the arbitration agreement is limited only “to negotiation of the terms, not the construction of the contract.” (Return Br. at 9.) She does not offer any authority or support for her cramped reading of the contract. The absence of any support for Ms. Walsh’s position is no surprise, as the “making thereof” language in the parties’ arbitration provision tracks the Federal Arbitration Act’s own language with respect to all gateway issues.

Section 4 of the Federal Arbitration Act requires a court to send a case to arbitration “upon being satisfied that the making of the agreement for arbitration” is not in issue. 9 U.S.C. § 4 (emphasis added). As noted above, the Supreme Court has been clear that even this question—that is, the “making of” an arbitration agreement—can be resolved by an arbitrator if an arbitration agreement so provides. *Rent-A-Center*, 561 U.S. at 68–69. Because the parties’ arbitration agreement here delegates to the arbitrator the same “making of” jurisdiction to resolve gateway issues that would otherwise be reserved to the court under the Federal Arbitration Act,

the Court should reject Ms. Walsh's artificial limitation of the parties' arbitration provision, and it should reverse the circuit court's denial of Boat-N-RV's motion to compel arbitration.

Such an outcome would be consistent with the plain language of the arbitration agreement, the Supreme Court's guidelines for enforcing such provisions, and the strong presumptions favoring arbitration. *See, e.g., Am. Recovery Corp. v. Computerized Thermal Imaging*, 96 F.3d 88, 92 (4th Cir. 1996) ("Thus, we may not deny a party's request to arbitrate an issue 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" (quoting *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582–83 (1960))).

CONCLUSION

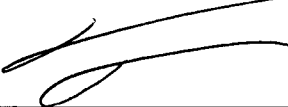
Ms. Walsh concedes in her complaint that she signed the parties' sales contract. She also concedes in her complaint that she began, but did not complete, her performance under the contract. Importantly, Ms. Walsh does not dispute that the sales contract contains a broad arbitration provision that applies to her claims in this case—which are to recover a portion of a deposit that she made pursuant to the parties' contract, and that Boat-N-RV is entitled to keep pursuant to the contract.

In short, Ms. Walsh's suggestion that no contract actually exists between the parties is baseless. So, too, is her argument that the parties' agreement to arbitrate any dispute about the "making" of their contract is limited only to disputes about their "negotiations." Accordingly, the Court should reject her posturing, reverse the circuit court's ruling, and enforce the parties' arbitration agreement according to its plain language.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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