THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

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.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This case essentially arises out of the Defendants'-Appellants' (hereinafter, "Defendants") wrongful retention of money that Plaintiff-Respondent (hereinafter, "Ms. Walsh") placed in trust with Defendants in anticipation of purchasing a recreational vehicle from Defendants. Defendants moved to compel arbitration pursuant to an arbitration clause found in a document referred to as a "purchase agreement." The Circuit Court properly held that the arbitration clause found in that document was not enforceable because there was no contract for the purchase of the subject vehicle, due to a failure of a condition precedent. Defendants filed a Notice of Appeal on January 18, 2017. It is undisputed that the vehicle has never been tendered or delivered to Plaintiff, nor was the trade-in vehicle ever tendered, delivered, or demanded.

FACTS

On or about September 13, 2015, Ms. Walsh visited Defendants' retail location in Ridgeland, South Carolina, near highway I-95. Ms. Walsh entered negotiations with agents or employees of Defendants for the purchase of a recreational vehicle and on that date also signed a document referred to as a "purchase agreement." The purchase agreement contained terms of a prospective contract for the purchase of a 2013 Mirada recreational vehicle for $95,000, paid partially through a trade-in. (R. p. 11). The purchase agreement also contained an arbitration clause and liquidated damages clause, providing for damages to the extent of Eleven Thousand Two Hundred Fifty Dollars ($11,250.00) or in the alternative submit to arbitration, in the event that Ms. Walsh canceled a contract with Defendants. (R. p. 11-12). In anticipation of forming a

contract for the purchase of the vehicle, Ms. Walsh provided a One Thousand ($1000.00) Dollar refundable deposit (paid by credit card), and a check for Twenty-Four Thousand ($24,000.00) Dollars. (R. p. 5, ¶¶ 8, 15). Included and incorporated into the written purchase agreement was an understanding that any purchase agreement or contract to purchase the vehicle would be conditioned upon securing third-party financing. A document signed contemporaneously with and incorporated into the purchase agreement, which is identified as the "Agreement Pending Financing/Regulation Z Disclosure," provides as follows: "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. 38).

Ultimately, although Defendants applied for credit, no third-party financing was secured on the terms no less favorable than those listed in the Agreement. In fact, Ms. Walsh received notices from several creditors denying Defendants' credit applications. (R. pp. 39 – 43). Ms. Walsh subsequently demanded that Defendants return her deposit and down payment. Defendants refunded One Thousand ($1,000.00) Dollar deposit to her credit card, and sent a check for Twelve Thousand Seven Hundred Fifty ($12,750.00) Dollars, after several months, several demands by Ms. Walsh, and only after an attorney became involved. Defendants refused to return the remaining $11,250.00 of the money that Defendants held in trust, pending the formation of the sale contract. (R. p. 6, ¶¶ 18, 19).

STANDARD OF REVIEW

The Circuit Court denied Defendants' Motion to Dismiss or Compel Arbitration, holding that there was no enforceable arbitration clause, because the parties did not form a contract. Because the existence of a contract is a question of law, the determination of whether a claim is

subject to arbitration is subject to de novo review. *Aiken v. World Fin. Corp.*, 373 S.C. 144, 148, 644 S.E.2d 705 (2007) (citing *Wellman, Inc. v. Square D Co.*, 366 S.C. 61, 67, 620 S.E.2d 86, 89 (Ct. App. 2005)). However, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. *Id* (citing *Thornton v. Trident Med. Ctr., L.L.C.*, 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct. App. 2003)).

ARGUMENTS

I. THE CIRCUIT COURT PROPERLY REFUSED TO ENFORCE AN ABRITRATION CLAUSE FOUND IN THE TERMS OF A PROSPECTIVE PURCHASE AGREEMENT, BECAUSE A CONTRACT WAS NEVER FORMED DUE TO FAILURE OF A CONDITION PRECEDENT.

Ms. Walsh never entered a contract with Defendants for the purchase of their recreational vehicle. A condition precedent to the formation of the contract existed, which did not occur. Because there is no contract, Ms. Walsh cannot be bound by any other terms of the purchase agreement, and there is no agreement to arbitrate any claims arising out of the non-existent contract.

Admittedly, and as pled in her complaint, Ms. Walsh signed a document referred to as "purchase agreement" with Defendants in anticipation of forming a contract for the purchase of a recreational vehicle in September of 2015. However, the parties understood and agreed that as condition precedent to the formation of the contract for the purchase of the vehicle, a third-party lender must have been willing to finance the purchase. This understanding is written in the terms of the purchase agreement and found in the Agreement Pending Financing/Regulation Z Disclosure. The plain language of this document, signed contemporaneously with the purchase agreement is that Ms. Walsh acknowledges entering "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 that those set forth immediately below." (R. p. 38). The Court

properly found as fact that "no third-party lender was willing to finance the purchase on the terms set forth in the agreement pending financing." (R. pp. 2 – 3) The Court also properly concluded that because this condition precedent was never met, there was no contract, and there was no enforceable arbitration agreement. (R. p. 3).

A. The Agreement Pending Financing/Regulation Z disclosure form is part of the "purchase agreement," and contains terms essential to any contract for sale and any consumer credit transaction.

The assertion of Defendants in their initial brief that the Agreement Pending Financing/Regulation Z Disclosure is "improper parol evidence" is without merit and has no basis in fact or law. In support of their claim, Defendants point to what they describe as a "merger and integration clause" on the back page of their purchase agreement stating that the front and back page of the purchase agreement contains the full and final expression of the agreement reached between the parties. However, Defendants are estopped from arguing that the Agreement Pending Financing/Regulation Z Disclosure is parol evidence because such disclosures are required by federal law and comprise essential terms to the formation of a contract. Although that document goes beyond Regulation Z in making the contract a pending agreement, Defendants are further estopped from taking this position because they did not deliver the vehicle. If the addendum relevant to financing were not a part of the arrangement, Defendant should have delivered the vehicle to Plaintiff.

Regulation Z "is issued by the Board of Governors of the Federal Reserve System to implement the federal Truth in Lending Act, which is contained in title I of the Consumer Credit Protection Act, as amended." 12 C.F.R. § 226.1(a). The regulation applies when (1) credit is offered or extended to consumers; (2) the offering or extension of credit is done regularly; (3) the credit is subject to a finance charge or is payable by a written agreement in more than four

installments; and (4) the credit is for personal, family, or household purposes. 12 C.F.R. § 226.1(b). In a closed-end credit transaction, Regulation Z requires that the amount financed, an itemization of the amount financed, finance charges, the annual percentage rate, payment schedule, and the total of payments, among other terms, must be disclosed to the consumer. 12 C.F.R. § 226.18. Because the purchase of the recreational vehicle would be a closed-end consumer credit transaction and an installment sale contract, the Agreement Pending Financing/Regulation Z Disclosure was required by Regulation Z as part of any contract for the sale of the vehicle, without which the transaction would have been illegal. That document, which is part of any prospective contract for an installment sale or consumer credit transaction, explicitly states that the entering of the written agreement is conditioned only upon the willingness of a third-party lender to finance the purchase. The Circuit Court found, and the Defendants admit, that no third-party lender offered to extend credit for the financing of the vehicle. Therefore, the Circuit Court's conclusion that there was no contract and no enforceable arbitration agreement was proper, and reasonably based upon the pleadings, the facts as pled, and Defendants' admissions.

Moreover, as further evidence of the absence of a contract, there was no meeting of the minds, because the terms of the loan were ultimately never specified, as no third-party lender offered credit in the transaction. Ms. Walsh could not have entered a contract to purchase a recreational vehicle on an installment sale basis, without having agreed to the terms of the credit offered by a potential third-party lender, or Defendants.

B. The Circuit Court correctly held that the arbitration clause found in the "purchase agreement" was not enforceable as the plain language of the Agreement Pending Financing/Regulation Z Disclosure creates a condition precedent to the formation of any contract.

In addition to the assertion that the Agreement Pending Financing/Regulation Z is somehow not part of the terms of the proposed agreement because it is compelled by federal

regulations, Defendants also argue that the Court erred in finding that the Agreement Pending Financing created a condition precedent to performance, but not a condition precedent to formation of the contract. A condition precedent to formation is one that must occur for a contract to exist. See *Wahl v. Hutto,* 249 S.C. 500, 155 S.E.2d 1 (1967). In *Wahl*, the Supreme Court of South Carolina held that an executed bond for title was an agreement to make title in the future upon the performance of certain conditions, that it did not constitute a sale, and there was no binding contract for sale when the condition precedent of securing adequate financing was an express condition of purchase. A plain reading of the Agreement Pending Financing indicates that Ms. Walsh did not enter the written agreement if a third party-lender was not willing to finance what, at that time, was only a potential and contemplated purchase of a recreation vehicle. This document reads as follows: "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. 38). The terms of the Agreement Pending Financing made clear that the entire agreement, and thus, the formation of the contract, was conditioned upon securing financing from a third-party lender. This is further supported by language on page 2 of the purchase agreement which states that "seller shall retain the title(s) to the Vehicle(s) shown on Page 1 of this Agreement until the purchase price has been fully paid and ***Buyer has executed all required documents of transfer***" (emphasis added). (R. p. 12, ¶ 1). Therefore, much like in *Wahl*, there was no transfer of title and there was no complete purchase agreement, for failure of the condition precedent of securing financing. While Defendants cherry-pick and emphasize certain language in the Agreement Pending Financing in their brief, the Court properly held that there was no contract or agreement, based on a plain reading of this agreement.

Defendants further suggest in their initial brief that securing financing was a condition precedent to performance and that the parties agreed that "Boat-N-RV would not deliver the vehicle to Ms. Walsh until she secured appropriate financing." This also has no basis in fact or in the text of the documents before the Circuit Court before that court's ruling. At no point in the purchase agreement or the Agreement Pending Financing do the documents state or otherwise imply that securing financing was a condition precedent ***only*** to performance of Boat-N-RV performance or delivery of the vehicle. Moreover, neither the purchase agreement nor Agreement Pending Financing state that Ms. Walsh was ultimately responsible for securing financing for the purchase. In fact, the Agreement Pending Financing indicates that Defendants were to undertake to secure a third-party lender to finance the purchase and that Ms. Walsh was authorizing the Defendants to submit her credit to "any of its partner lenders identified" in the document. (R. p. 38). Prior to the Circuit Court's ruling Ms. Walsh submitted notifications that she received from five of Defendants' "partner lenders" declining financing of the potential purchase. While it is Ms. Walsh's position that the condition precedent to the formation of the contract was not ultimately fulfilled, regardless of which party bore the duty to secure third-party financing, the written terms of the prospective contract clearly demonstrate an understanding that Boat-N-RV was to search for and attempt to secure this financing, before a contract could come into existence.

Additionally, Defendants cite *dicta* from other jurisdictions in support of their argument that the willingness of a third-party lender to extend credit to Ms. Walsh for her potential purchase was a condition precedent to performance and not a condition precedent to the formation of the contract. The holdings in the cases cited by Defendants are not germane to the present case, as those cases involved arms-length business transactions between sophisticated parties, which did not trigger Regulation Z, promulgated under the Truth in Lending Act for personal consumer

transactions. Whereas, Defendants in the present case were compelled under Regulation Z to provide the terms of credit under any installment sale agreement. While they were not compelled by Regulation Z to state that the agreement was "pending[1]," in doing so, Defendants verified that there was no contract until there was financing.

II. THE FEDERAL ARBITRATION ACT DOES NOT APPLY SUCH THAT THE PRESENT CASE SHOULD BE COMPELLED TO ARBITRATION.

Although the Federal Arbitration Act may well apply to an agreement between Ms. Walsh and Defendants to arbitrate if a contract to purchase a vehicle from Defendants had been formed, the Federal Arbitration Act does not compel her to arbitration because there was no agreement to purchase a vehicle for failure of the condition precedent to the formation of the contract. Because there is no contract between the parties, the arbitration clause found in the terms of the proposed contract could not be enforced by the Court, pursuant to the Federal Arbitration Act.

The arbitration clause found in the "purchase agreement" states as follows:

> The Parties agree that the purchase and sale of the Vehicle(s) described on Page 1 of this Agreement is an act of interstate commerce implicating the Federal Arbitration Act to the exclusion of any and all State arbitration acts. Except and only as limited by the final sentence of this numbered Paragraph, **THE PARTIES FURTHER AGREE THAT ANY CLAIM OR CONTROVERSY ARISING OUT OF OR OTHERWISE RELATING TO THIS AGREEMENT INLCUDING THE MAKING THEREOF, SHALL BE RESOLVED THOUGH (sic) BINDING ARBITRATION, WITH THE SEAT OF SUCH ARBITRATION TO BE TO BE LOCATED IN KNOX COUNTY, TENNESEE, TO THE EXCLUSION OF ALL OTHER LOCALES . . .**

(R. p. 12, ¶ 10).

The arbitration clause states that the purchase and sale of the Vehicle(s) described on the first page of the agreement is an act of interstate commerce. However, as discussed thoroughly above, there

[1] The term Pending is defined as "Begun, but not yet completed; during; before the conclusion of; prior the completion of; unsettled; undetermined; in process of settlement or adjustment. *Pending*, Black's Law Dictionary (4th Ed. 1968).

was no purchase or sale of the vehicle, which would constitute interstate commerce, and there is no agreement to arbitrate, exclusive of any agreement for the purchase or sale of the vehicle.

Defendants argue that because the arbitration clause refers to the "making" of the contract, the parties agreed to arbitrate whether or not the parties had formed a contract. In support of this contention, Defendants cite *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63 (2010), in which the U.S. Supreme Court recognized that "gateway" questions of arbitrability could be compelled to arbitration. However, the "making" of any agreement refers to negotiation of the terms, not the construction of the contract. Whether there was a contract or an agreement to arbitrate in the first right is question of law properly decided by the Circuit Court, and not contained in the arbitration agreement. Therefore, assuming *arguendo* there was an agreement to arbitrate separate from the purchase or sale of the vehicle, which Ms. Walsh fervently disputes, the arbitration clause does not extend to whether a contract exists; rather, it would only apply to disputes about negotiation or interpretation of the terms of a contract. Moreover, in *Rent-A-Center*, the issue before the Court was whether the threshold issue of enforcement of the arbitration clause (whether the arbitration clause was conscionable) could be compelled to arbitration, not whether there was a contract or agreement to arbitrate existed at all. Accordingly, the Circuit Court correctly held that the present case could not be compelled to arbitration because the question of whether there was a contract was a question of law, and this conclusion was reasonably based upon the evidence before the Circuit Court.

III. DEFENDANTS DID NOT MOVE THE CIRCUIT COURT TO ALTER OR AMEND ITS JUDGMENT PURSUANT TO SCRCP RULE 59, AND IN THEIR OMMISSION, DEFENDANTS FAILED TO PRESERVE THEIR ARGUMENTS FOR APPEAL.

The bulk of Defendants arguments on appeal are not properly before this Court or are based upon facts that were not preserved for argument on appeal, because Defendants failed to move to

alter or amend the Circuit Court's Order, pursuant to SCRCP Rule 59. Accordingly, any arguments or evidence not properly preserved for appeal should not be considered by this Court in rendering its decision.

A. The scope of this Court's Review is limited only to the issues addressed by the Circuit Court in its Order Denying Defendants' Motion to Compel Arbitration.

On the date of the hearing, Defendants submitted a Memorandum in Support of Motion to Compel Arbitration, in which Defendants argued broadly that the case implicates the Federal Arbitration Act because it involved the sale of a "vehicle to a New Jersey resident from a South Carolina-based business." (R. p. 14, ln. 6). Defendants also generally argued that based upon the language of the arbitration clause, the Circuit Court should submit the matter to arbitration. In support of their Motion to Compel Arbitration, Defendants submitted Orders in two other cases in which they were defendants, wherein the 14th Circuit Court of Common Pleas compelled arbitration based upon the same or substantially similar arbitration clause. Notably, however, both cases involved complaints alleging breach of contract after the Plaintiffs had already purchased and took possession of vehicles from Boat-N-RV. (R. pp. 22-34).

In response to Ms. Walsh's argument at the hearing and in her Memorandum in Opposition to Motion to Compel, Defendants submitted their Reply in Support of Motion to Compel Arbitration, dated September 26, 2016. Defendants' Reply commences with the absurd statement that Ms. Walsh's counsel had not provided to Defendants a copy of the Agreement Pending Financing/Regulation Z, a document in Defendants' possession that was signed contemporaneously with and integrated into any prospective agreement, which Defendants happened to conveniently leave out of the materials that they presented to the Court in support of their Motion. (R. p. 34, ln. 8 – 13). In their Reply, Defendants erroneously represented to the Court

that the Agreement Pending Financing states that there is "an acknowledgement that the parties have entered into a contract to purchase a vehicle," when the document reads that any written agreement is "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. 44, ln. 14 – 15; R. p. 38). Although it is clear from the language of the Agreement Pending Financing that Defendants were to secure the financing through a third-party "partner lender," Defendants asserted in their Reply that Ms. Walsh had obligations to secure financing. *Id.* Defendants further stated, but the Circuit Court did not find, that Plaintiff somehow failed to "cooperat[e] with potential lenders to secure financing" and argued that this did not eliminate the contract. (R. p. 45, ln 8).

On November 10, 2017, Judge Murphy's law clerk sent an email stating that after "taking the matter under advisement and considering the pleadings, memorandum, and arguments" the Court was denying Defendants' Motion to Compel Arbitration. (R. p. 50). On that same date, counsel for Defendants emailed the Honorable Maité Murphy through her law clerk to express his disagreement with the Court in its decision to deny the Motion. In this informal communication, counsel for Defendants argued that Ms. Walsh was actually responsible for securing financing and that she failed to cooperate with Defendants in their efforts to secure a third-party lender. In support of this assertion, Defendants attached a PDF document to the email, which contained what Defendants purport to be an electronic statement from a potential creditor with some handwritten notes, not identified or authenticated by Defendants, and a copy of the Agreement Pending Financing/Regulation Z, which appears to include handwritten editions of the terms originally set forth and compulsorily disclosed pursuant to Regulation Z. (R. pp. 51, 52). After Ms. Walsh submitted a proposed order pursuant to the Court's instructions, counsel for Defendants sent yet another email to Judge Murphy's chambers objecting to the order, arguing again that the Court

erred in denying the motion and asking that the Court permit discovery on the facts surrounding the arbitrability of the case. (R. p. 54). Defendants' informal arguments and objections via email were later filed with the Court as "Objections to Proposed Order Regarding Motion to Compel Arbitration," dated November 14, 2016. (R. pp. 46 – 55). Ultimately, however, Defendants neither moved to alter or amend the Court's judgment pursuant to SCRCP Rule 59, nor did they attempt to reopen the record to submit this evidence to the Court. Instead, Defendants filed a Notice of Appeal on January 19, 2017.

South Carolina appellate practice rules provide that this Court "may affirm any ruling, order, or judgment upon any ground(s) appearing in the Record on Appeal." SCACR Rule 220(c). A respondent's brief may also "contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c)." SCACR Rule 208(b)(2). In contrast, different preservation rules apply to an appellant. The appellant, by way of a motion to alter or amend judgment pursuant to Rule 59, "must first try to convince the lower court it . . . has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred." *l'On, L.L.C. v. Town of Mt. Pleasant*338 S.C. 406, 422, 526 S.E.2d 724 (2000). This principle is based upon the "long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments." *Id.* (citing *Smith v. Phillips*, 318 S.C. 453, 458 S.E.2d 427 (1995)). Moreover, if the appellant raised an issue and the court failed to rule upon it, the appellant must file a motion to alter or amend the decision in order to preserve the issue for appellate review. *Id.*

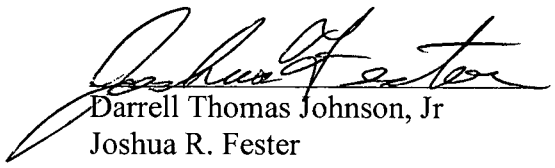
Because the Defendants failed to move to alter or amend the decision of Circuit Court, this Court's review of the Circuit Court's decision is limited only to the issues found in the Order. In

its Order, the Circuit Court found that a third-party lender's willingness to finance the purchase of the RV was a condition precedent to the formation contract and that the arbitration agreement was not enforceable because there was no meeting of the minds and no contract to purchase an RV. Any arguments found in any of the memoranda or informal communications with the Circuit Court via email, besides argument about these issues, should not be considered by this Court. Accordingly, the following arguments by Defendants are not properly preserved for this Court's review: the Agreement Pending Financing is parol evidence that should be disregarded; that the terms of the Agreement Pending Financing constituted a condition precedent to performance rather than to formation of a contract; that Ms. Walsh was responsible for securing financing for the potential purchase and failed to do so; that the arbitration agreement existed independent of the formation of a contract and applied to the question of whether or not a contract existed; and that the Federal Arbitration Act applies and requires that the Circuit Court compel arbitration pursuant to the arbitration clause. Moreover, the appellate preservation rules do not extend to informal communications with the Court after a Court's ruling, and, unfortunately for Defendants, emails to the Court's chambers are no substitute for a motion to alter or amend, pursuant to Rule 59. Therefore, the arguments and additional information found in those emails sent to the Circuit Court's chambers, and later memorialized by Defendants' Objections to Proposed Order Regarding Motion to Compel Arbitration, are improper for this Court's consideration. Consideration of these "objections," particularly, would be contrary to long-established rules of issue preservation and would be manifestly unfair to Ms. Walsh, who did not have the opportunity to address the issues which were discussed by Defendants.

CONCLUSION

For the reasons stated above, this Court should Affirm the judgment of the Circuit Court.

Respectfully Submitted,



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