

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM JASPER COUNTY
Court of Common Pleas

The Honorable Maité Murphy
Circuit Court Judge

Appellate Case No. 2019-001080
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 Petitioner.

REPLY BRIEF OF PETITIONER

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INTRODUCTION

Just as she did when opposing Boat-N-RV's certiorari request, Ms. Walsh fails to engage on the actual issues of the case, but again retreats to arguing that the parties' Sales Contract does not really exist (even though she concedes that she signed it and began performing under it) and that the arbitrability of this case is not preserved for appellate review (even though it is the only issue that has been litigated in this case).

The Court appeared to reject those arguments when it granted certiorari and agreed to review the Court of Appeals' summary decision, which is contrary to more than 50 years of unbroken case law that requires arbitration in exactly this situation. It should once again reject her arguments that dodge the dispositive issue of this appeal, reverse the Court of Appeals' decision, and enforce the parties' unambiguous Arbitration Agreement, as required by a series of rulings from this Court and the United State Supreme Court.

ARGUMENTS AND AUTHORITIES

I. By arguing about whether the parties entered into the Sales Contract, Ms. Walsh has confirmed that this case must be compelled to arbitration, consistent with scores of controlling on-point precedent.

Ms. Walsh never disputes the specific point that the parties entered into their Arbitration Agreement. She cannot, because she concedes in her complaint that she signed the very Sales Contract in which it is found. (Appx. 74; Compl. ¶ 7.)

Instead, she devotes her entire brief to attacking the Sales Contract as a whole and arguing that the parties never truly entered into the overall contract based a labored interpretation of a Regulation Z disclosure form. (*See, e.g.*, Opp'n Br. at 2 (arguing that the Sales Contract was a "prospective contract for the purchase of a 2013 Mirada recreational vehicle"); *id.* at 2–3 (arguing that even though Ms. Walsh tendered the contractually-required down payment and Boat-N-RV

returned the portion of that deposit less its contractually-stated damages, that money changed hands “pending the formation of the sales contract”); *id.* at 5 (acknowledging that the Court of Appeals “affirmed the finding that the purchase agreement was conditioned upon the willingness of a third party to finance the purchase”); *id.* at 6 (“Ms. Walsh never entered a contract with Petitioners for the purchase of their recreational vehicle.”); *id.* at 7 (arguing that the parties’ Sales Contract does not exist because of the failure of a “condition precedent to the formation of the contract”); *id.* at 9 (arguing that “there was no complete purchase agreement”).

Her appellate argument underscores Boat-N-RV’s position perfectly. At no point in this case has Ms. Walsh ever challenged the actual Arbitration Agreement itself, nor did the Court of Appeals (or the circuit court, for that matter) ever find a defect with the Arbitration Agreement itself.¹

But under *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), and its progeny, the only way to bypass an arbitration agreement is to independently attack the specific arbitration provision; a challenge to the contract as a whole, like that lodged by Ms. Walsh here, is irrelevant to the arbitrability analysis. *See, e.g., New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 538 (2019) (“Unless a party specifically challenges the validity of the agreement to arbitrate, both sides may be required to take all their disputes—including disputes about the validity of their broader contract—to arbitration.”); *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010) (“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.”); *Munoz v. Green Tree Fin.*

¹ Contrary to Ms. Walsh’s attempt to skew the standard of review here, the circuit court’s decision is not entitled to any deference because the circuit court never made any factual findings specific to the parties’ Arbitration Agreement. Accordingly, this Court reviews the lower courts’ decisions *de novo*. *See, e.g., Thornton v. Trident Med. Ctr., LLC*, 357 S.C. 91, 94, 592 S.E.2d 50, 51 (Ct. App. 2003) (“Determinations of arbitrability are subject to *de novo* review.”).

Corp., 343 S.C. 531, 540, 542 S.E.2d 360, 364 (2001) (“Under the FAA, an arbitration clause is separable from the contract in which it is embedded and the issue of its validity is distinct from the substantive validity of the contract as a whole.”).

This analysis holds especially true when an arbitration agreement delegates “gateway” issues—such as whether the parties agreed to arbitrate in the first place—to an arbitrator. *See Rent-A-Center*, 561 U.S. at 68–69 (“We have recognized that parties can agree to arbitrate ‘gateway’ questions of ‘arbitrability,’ such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy.”). That is exactly the case here, as the parties’ unchallenged Arbitration Agreement states that they have agreed to resolve any dispute about **“THE MAKING”** of their Sales Contract. (Appx. 81; Sales Contract at 2 ¶ 10 (all capital letters, bold, and underlined in the original).)

In short, Ms. Walsh’s appellate argument confirms that arbitration is required here. She challenges the “making” of the Sales Contract, which the parties unambiguously agreed would be an arbitrable issue, but she does not make any independent challenge to the Arbitration Agreement itself. Arbitration is required under these circumstances, and the Court of Appeals’ ruling to the contrary should be reversed accordingly.

II. Ms. Walsh’s attempts to bypass this crush of controlling authority are futile.

A. Boat-N-RV preserved the arbitrability of this case for appellate review, as this has been the only issue that has been litigated thus far.

At various points in her opposition brief, Ms. Walsh tries to avoid this outcome by arguing that Boat-N-RV has not preserved the issue of arbitrability for this Court’s review. (*See, e.g.*, Opp. Br. at 10–12 (arguing sporadically that the question of arbitrability is not properly before the Court).) She made these exact same arguments in opposition to certiorari. (Opp. to Cert. at 7–10.) The Court rejected them earlier when it granted certiorari, and it should reject them again now.

For one, the Court of Appeals confirmed that the issue was preserved because it substantively ruled on it, albeit inconsistently with the authority cited in its own order. (App. 2; Court of Appeals Order ¶ 1.)

Likewise, the question of arbitrability is truly the only issue that has been litigated throughout this entire case. Boat-N-RV filed a motion to compel this matter to arbitration. (Appx. 78; Boat-N-RV's Motion to Dismiss or Compel Arbitration.) In that motion, Boat-N-RV cited *Rent-A-Center* for the very same proposition of law for which it cites that case here:

Third and finally, the arbitration agreement expressly states that any dispute regarding the making of the contract shall be submitted to binding arbitration. (Sales Agreement ¶ 10, at 2.) As such, the contract evidences the parties' "clear and unmistakable" intention for an arbitrator to resolve any potential challenge here. *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 69 n.1 (2010) (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (internal brackets omitted)).

(Appx. 85; Boat-N-RV's Memorandum in Support of Motion to Compel Arbitration at 4.)

Despite being provided this authority, the circuit court ruled—incorrectly—that arbitration was not required here because “the arbitration clause contained in the ‘purchase agreement’ is not enforceable because the parties never formed a contract for the purchase of an RV.” (Appx. 72; Order Denying Defendants' Motion to Compel Arbitration at 3.) That ruling was an express rejection of both Boat-N-RV's argument and the governing authority, meeting this Court's standards for issue preservation. *See, e.g., Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733–34 (1998) (explaining that an issue “must have been raised to and ruled upon by the trial judge to be preserved for appellate review”).

Ms. Walsh's recycled argument that the arbitrability of this dispute is somehow not preserved for review is simply incorrect and should be rejected, just as it was when she raised it in opposition to certiorari review.

B. There is no way that Ms. Walsh can distinguish the case law that controls the arbitrability of this case.

Ms. Walsh also attempts to avoid the outcome required by the *Prima Paint* line of authority by trying to distinguish that body of cases. Those attempts all miss the mark.

First, Ms. Walsh argues that *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 667 S.E.2d 1 (Ct. App. 2008), somehow supports not enforcing the Arbitration Agreement in this case. (Opp. Br. at 12–13.) It does no such thing.

In *New Hope Missionary Baptist Church*, the plaintiff gave the defendant a \$25,000 deposit (just like here, all the way down to the amount of the deposit) pursuant to a contract that it signed (just like here) and that contained an arbitration agreement (just like here). 379 S.C. at 624–25, 667 S.E.2d at 3–4. The plaintiff opposed arbitration then by arguing that the overall contract “does not exist” (just like here). *Id.* at 629, 667 S.E.2d at 5. Citing *Prima Paint*, the *New Hope Missionary Baptist Church* court rejected that plaintiff's argument and compelled arbitration “since the Church failed to specifically challenge the arbitration agreement.” *Id.* at 626, 667 S.E.2d at 3.

There is not an ounce of daylight between this case and *New Hope Missionary Baptist Church*,² and Ms. Walsh's reliance on that case cannot assist her in avoiding arbitration here.

Nor does her citation to *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006). There, the Supreme Court concluded that “regardless of whether the challenge is brought in federal

² Puzzlingly, the Court of Appeals cited *New Hope Missionary Baptist Church* in its order denying to enforce the parties' Arbitration Agreement. (Appx. 2; Court of Appeals Order ¶ 1.) That case unambiguously stands for the proposition that arbitration is required here.

or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.” *Id.* at 449.

To distinguish that case, Ms. Walsh cites a footnote in which the Court stated that the issue presented in *Buckeye Check Cashing* did not address “whether the alleged obligor ever signed the contract.” *Id.* at 444 n.1 (cited on Page 14 of Ms. Walsh’s Brief). But that is no distinction at all because Ms. Walsh asserted in the complaint that she did sign the Sales Contract. (*See* Appx. 74; Compl. ¶ 7 (conceding that “Ms. Walsh signed a purchase agreement with Defendants”).)

Moreover, cases following *Buckeye Check Cashing* make clear that when an arbitration agreement contains a delegation provision that appoints an arbitrator to decide “gateway” issues about the “making” of a contract, the only way to avoid arbitration is to attack the arbitration agreement itself. This was the very point of the Supreme Court’s 2010 decision in *Rent-A-Center*, which Boat-N-RV has cited at every stage of this litigation. *See* 561 U.S. at 72 (“Accordingly, unless Jackson challenged the delegation provision specifically, we must treat it as valid under § 2 [of the Federal Arbitration Act], and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator.”).

Not surprisingly, the only other authorities that Ms. Walsh has marshaled in support of her position (1) predate *Rent-A-Center*, (2) are from non-controlling courts, and (3) do not involve a delegation provision like that presented here:

- *Sanford v. MemberWorks, Inc.*, 483 F.3d 956 (9th Cir. 2007) (Opp. Br. at 14–15). In *Sanford*, the Ninth Circuit vacated an order compelling arbitration where the plaintiffs disputed the existence of the parties’ contract, but there was no agreement to arbitrate “gateway” issues about the “making” of that contract. 483 F.3d at 962–64.
- *Thompson v. Lithia Chrysler Jeep Dodge of Great Falls*, 185 P.3d 332 (Mont. 2008) (Opp. Br. at 15). In *Thompson*, the court reversed an order compelling arbitration where the defendant sought to enforce an arbitration agreement within a purchase order that the defendant itself attempted to rescind. *Id.* at 335. Moreover, unlike in this case, the contract in *Thompson* specifically provided that it would not be binding until a third-

party financier agreed to it, and the arbitration clause did not delegate “gateway” issues to an arbitrator for resolution. *Id.* at 334.

These cases are fundamentally distinguishable from the instant dispute, and provide no basis for avoiding the *Prima Paint* line of authority that requires arbitration here. The Court should reject Ms. Walsh’s reliance on them accordingly.

C. There are no conditions precedent to contract formation here, as the parties agreed to all material terms, and the only thing that remained was for them to complete their respective obligations to perform under the Sales Contract.

Ms. Walsh cannot sidestep arbitration here by arguing that the parties’ Sales Contract contains an unfulfilled condition precedent to contract formation. In addition to being exactly the type of “making of the contract” question that the parties have delegated to an arbitrator for resolution, her argument is incorrect as a matter of law.

When parties reach a final bargain regarding all “essential terms,” “the existence and validity of the contract d[o] not depend upon the happening of” a stated condition. *Champion v. Whaley*, 280 S.C. 116, 122, 311 S.E.2d 404, 407–08 (Ct. App. 1984). This is true even when, as here, the so-called condition is a requirement that a buyer secure financing. *See id.* (affirming that a contract existed even though one party’s “duty of performance was qualified by the condition that she obtain a 100% FmHA loan”); *see also Westlake Petrochemicals, LLC v. United Polychem, Inc.*, 688 F.3d 232, 240 (5th Cir. 2012) (“[T]he record makes clear that the condition of obtaining acceptable credit was at most a condition precedent to performance, not to the formation of the contract.”) (emphasis supplied by the *Westlake* court).

Just as she did when opposing certiorari review, Ms. Walsh opposes this line of authority by citing *Wahl v. Hutto*, 249 S.C. 500, 155 S.E.2d 1 (1967). (Opp. Br. at 8–9.) But that case avoids the relevant analysis altogether, because both the buyer and seller in *Wahl* agreed that they had conditioned the existence of their contract on future events. *Id.* at 504, 155 S.E.2d at 3.

Accordingly, courts have specifically rejected *Wahl* as having any applicability to the “condition precedent to formation-versus-condition precedent to performance” analysis. *See Champion*, 280 S.C. at 123, 311 S.E.2d at 408 (rejecting a party’s reliance on *Wahl* because all parties in *Wahl* agreed that they “did not intend a contract to come into existence until the condition had occurred”).

Instead, as a matter of law, when “nothing was left to negotiate” between the parties, they have “reached a final bargain,” and “[o]nly performance remained.” *Id.* at 122, 311 S.E.2d 407. Whether a buyer, such as Ms. Walsh, has to secure financing to complete a purchase does not change the fact that he or she has entered into a contract with the seller. *Id.*; *see also Worley v. Yarborough Ford, Inc.*, 317 S.C. 206, 209, 452 S.E.2d 622, 624 (Ct. App. 1994) (explaining that a party is obligated to complete its performance under a contract even when it is unable to secure third-party financing).

The fact that Ms. Walsh began performing under the parties’ contract only confirms this point. So, too, does the Regulation Z disclosure form on which her argument singularly relies, as it states that the parties “have entered into a written contract,” not that they “will enter” or “might enter” or “may enter” an agreement once she secures third-party financing. (Appx. 107.)

At bottom, nothing in Ms. Walsh’s opposition brief rebuts the fact that “condition precedent” here relates to contract performance, not contract formation. To the extent that the Court finds that this is a question it can address—again, the parties have delegated such issues to an arbitrator for resolution—it should reverse the Court of Appeals’ contrary ruling.

III. It would not be unconscionable to require Ms. Walsh, a resident of New Jersey, to arbitrate this dispute just as she agreed to do.

Ms. Walsh closes her opposition brief with a new argument that the Sales Contract is unconscionable. (Opp. Br. at 16–18.) She first argues that the liquidated-damages provision of that

contract is “one-sided and oppressive” because her refusal to perform her own obligations under the Sales Contract triggered the forfeiture of part of her down payment. (Opp. Br. at 17–18.) This is not only circular—“I think this is unfair because I don’t like it, and I don’t like it because I think this is unfair”—it is not a question that is in any way relevant to the arbitrability of the case, which is the only issue pending before the Court. If Ms. Walsh wishes to challenge the liquidated-damages provision of the Sales Contract before an arbitrator, she is free to do so. But that does not have anything to do with the arbitrability of this case.

Similarly, Ms. Walsh argues that requiring her to arbitrate this case would be unconscionable because the Arbitration Agreement sets the forum for arbitration in Knox County, Tennessee, where Boat-N-RV’s nerve center is located. (Appx. 81; Sales Contract at 2, ¶ 10.) This makes little sense.

Ms. Walsh—who lives in Washington, New Jersey (Appx. 80; Sales Contract at 1)³—is over 100 miles closer to Knox County, Tennessee, than she is to Ridgeland, South Carolina. Moreover, forum-selection clauses in arbitration agreements that require arbitration outside of South Carolina are enforceable. *See Trittech Elec., Inc. v. Frank M. Hall & Co.*, 343 S.C. 396, 400, 540 S.E.2d 864, 866 (Ct. App. 2000) (holding that the Federal Arbitration Act preempted a competing South Carolina statute that prohibited enforcing out-of-state forum-selection clauses in arbitration agreements).

Other than complaining about the venue of arbitration, Ms. Walsh does not argue that she would be deprived of a fair opportunity to present her case before an arbitrator, nor can she

³ Ms. Walsh’s residency in New Jersey confirms the presence of interstate commerce here and, accordingly, the applicability of the Federal Arbitration Act. 9 U.S.C. § 2. The Arbitration Agreement also says that it is governed by the “Federal Arbitration Act to the exclusion of any and all State arbitration acts.” (Appx. 81; Sales Contract at 2, ¶ 10.)

legitimately do so, as the Arbitration Agreement contains a variety of procedural safeguards designed to ensure a full and fair process for resolving disputes. It provides that discovery in any arbitration will be governed by the Federal Rules of Civil Procedure. (Appx. 81; Sales Contract at 2, ¶ 10.) It provides that any merits hearing will be governed by the Federal Rules of Evidence. (*Id.*) And it preserves Ms. Walsh’s access to the magistrate’s court if she wishes to pursue her claim there. (*Id.*)

Finally, Ms. Walsh cannot render the Arbitration Agreement unenforceable by simply noting its inclusion in a form contract. *See Munoz*, 343 S.C. at 541, 542 S.E.2d at 365 (rejecting an argument that an arbitration provision within an adhesion contract was not unenforceable and reiterating that “an adhesion contract is not per se unconscionable”).

At bottom, the Court should disregard Ms. Walsh’s new argument that requiring her to arbitrate her case—just as she agreed—would be unconscionable. It would not, and the Court should enforce the parties’ Arbitration Agreement accordingly.

CONCLUSION

The Court of Appeals’ decision not to enforce the parties’ Arbitration Agreement is contrary to an unbroken line of authority from the Supreme Court and this Court that has been in place for over 50 years. Ms. Walsh’s challenge to the Sales Contract as a whole is insufficient as a matter of law to bypass their agreement to arbitrate this case, as well as all disputes associated with the “making” of that contract. Accordingly, Boat-N-RV respectfully requests that the Court reverse the Court of Appeals’ decision and enforce the parties’ Arbitration Agreement.

Respectfully submitted,

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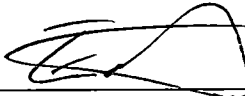
I, the undersigned Legal Assistant of the law offices of Womble Bond Dickinson (US) LLP, Attorneys for Petitioner, do hereby certify that I have served the below parties in this action with a copy of the pleading(s) specified below by mailing a copy of the same, postage prepaid, to the following address(es):

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