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GREENVILLE CO. S.C
PAUL B WICKENSIMER

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF GREENVILLE 2013 JAN -8 P 1:12) Case No: 2012-CP-23-07156
)
Christine Watts)
)
Plaintiff,)
) Order
vs.)
)
Sonic Automotive 2752 Laurens Road,)
Greenville, Inc.)
Defendants.)
)

The issue is whether Defendant Century BMW's Motion for Judgment on the Pleadings for Failure to Join an Indispensable Party or, In the Alternative, to Compel Arbitration should be granted or denied. For reasons described herein, I hereby DENY Defendant Century BMW's motion.

PROCEDURAL HISTORY

This action was initiated on August 29, 2006. Ms. Watts alleges that Century BMW was charging illegal closing fees in violation of S.C. Code Ann. § 37-2-307 and § 56-15-10, *et seq.* and did engage in one or more of the following illegal acts:

a. Failed to register with the Dept. of Consumer Affairs;
b. Failed to individually register annually with the Dept. of Consumer Affairs;
c. Charged illegal "administrative fees" in excess of the amount for which it registered;
d. Failed to disclose the illegal "administrative fees" on sales contracts;
e Charged illegal "administrative fees" in excess of their costs;
f. Failed to display the charging of illegal "administrative fees" in a conspicuous location in the dealership;
g. Advertised deceptively and illegally by failing to include the "administrative fees" in the advertiwsed price; and
h. Created a closing procedure to illegally add "administrative fees".

Ms. Watts contends that the conduct of Century BMW violates the South Carolina Dealer's Act. (S.C. Code Ann. § 56-15-10).

Century BMW filed a motion to compel arbitration, claiming arbitration was required by an agreement under which Ms. Watts waived the right to bring or participate in any class action or multi-

plaintiff or claimant action in court or through arbitration. This motion was denied by this Court in an order dated March 10, 2008. The order concluded that *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663 (S.C. 2007) was "the controlling authority" for the motion.

On March 12, 2008, Century BMW filed a notice of appeal to the South Carolina Court of Appeals. On July 6, 2009, before the South Carolina Court of Appeals ruled, the South Carolina Supreme Court took the appeal. On April 19, 2010, the South Carolina Supreme Court issued an order holding that the provision of the arbitration agreement relied upon by Century BMW was invalid, unenforceable, and in violation of the public policy of South Carolina, specifically South Carolina Code § 56-15-110. The decision in pertinent part is as follows:

> The purpose of the Dealers Act is consumer protection. Damages are typically small in individual consumer cases, thereby discouraging plaintiffs from bringing individual actions
>
> Our Legislature recognized this and expressly provided plaintiffs with the right to bring class action lawsuits for violations of the Dealers Act:
>
> > When such action is one of common or general interest to many person or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for benefit of the whole, including actions for injunctive relief.
>
> Section 56-15-110(2). The Dealers Act provides: "Any contract or part thereof or practice thereunder in violation of any provision of this chapter shall be deemed against the public policy and shall be void and unenforceable." Section 56-15-130.
>
> 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 fro violation of the Dealer Act and that any contract prohibiting a class action suit, violates our State's public policy and is void and unenforceable. . . . We are guided by our state law, and the unmistakable statutory language contained in the Dealers Act indicating our Legislature intended for this to be a non-waivable right. We therefore hold this provision is unenforceable on public policy grounds. *See Carolina Care Plan, Inc. v. United HealthCare Servs., Inc.*, 606 S.E.2d 752, 758 (S.C. 2004) (holding the general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution).

Herron v. Century BMW, 387 S.C. 525, 535-536, 693 S.E.2d 394, 399-400 (S.C. 2010).

Following the South Carolina Supreme Court's refusal to enforce the arbitration agreement, Century BMW filed a Petition for Rehearing. By order dated June 9, 2010, the South Carolina Supreme Court denied the same.

On August 31, 2010, Century BMW petitioned the United States Supreme Court for a writ of certiorari. While that petition was pending, the U.S. Supreme Court issued its decision in *AT&T Mobility, LLC v Concepcion*, 131 S Ct. 1740 (April 27, 2011). The Court then remanded this case to the South Carolina Supreme Court for further consideration, in light of *AT&T*

After supplemental briefing and oral argument centering on preemption, the South Carolina Supreme Court issued its opinion, dated December 19, 2011 In its opinion, the South Carolina Supreme Court found, as a matter of state law, ***preemption was not timely raised*** and "is procedurally barred as a matter of state law." *Herron v. Century BMW*, 395 S.C. 461, 469-470, 719 S.E.2d 640, 644-645 (2011) ("*Herron II*").

Century BMW then filed a petition for a Writ of Certiorari in the U.S. Supreme Court, arguing that the S C. Supreme Court's ruling that Century BMW has "forfeited" the preemption argument by failing to raise it to any prior court was unfair because it would "deprive [Century BMW] of a 'reasonable opportunity' to assert its federal rights." *See* Petition for a Writ of Certiorari.

On May 21, 2012, the U.S Supreme Court denied certiorari. Thus, the controlling opinion in this case is the S.C. Supreme Court holding that, in Century BMW's words, Century BMW "forfeited its preemption argument." This is the law of the case.

PREEMPTION

First, I DENY Defendant Century BMW's Motion (in the alternative) to Compel Arbitration. The S.C. Supreme Court's opinion in *Herron II* held, Century BMW could not continue to re-litigate the enforceability of the arbitration agreement by raising arguments it chose not to argue, when the motion to compel arbitration was first argued. The S.C. Supreme Court's opinion in *Herron II* provides in part:

> [I]t is clear preemption was neither a novel nor an unknown argument to [Century BMW]. Significantly, [Century BMW] did raise the issue of preemption to the trial court, albeit in a different context. [Plaintiff] initially challenged the arbitration agreement on the basis that it lacked certain formatting requirements under the South Carolina Arbitration Act. However, Appellant successfully defeated the state law challenge based on preemption, specifically arguing that the FAA preempted state law due to the presence of interstate commerce. The voluminous record is otherwise silent as to any claim of preemption, until the petition for rehearing filed with this Court.

Herron v. Century BMW, 395 S.C. 461, 469, 719 S.E.2d 640, 644 (S.C. 2011)

> As this Court observed, issue preservation rules "prevent[] a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 406, 522 S.E.2d 716, 724 (S.C. 2000). Here, intentionally or by chance, [Century BMW] kept the ace card of preemption up its sleeve until after this Court filed its opinion. Under even the most liberal approach to issue preservation principles, we could not treat [Century BMW's] preemption argument as preserved in our ***courts*** as a matter of state law.
>
> Because the matter of preemption was not raised to and ruled upon in any of the South Carolina proceedings, we find the issue of preemption is procedurally barred as matter of state law and further consideration in light of *AT&T Mobility, LLC v. Concepcion* is unwarranted. We reinstate our original opinion and decline to revisit it.

Herron v. Century BMW, 395 S.C. 461, 470, 719 S.E 2d 640, 645 (S.C. 2011) (emphasis added).

It is significant that the S.C. Supreme Court used the word "courts", plural, thereby signifying its opinion's applicability to <u>all</u> state courts and not solely the South Carolina Supreme Court. Furthermore, in light of the S C. Supreme Court's holding in *Herron II*, this issue is "procedurally barred as a matter of state law and further consideration in light of *AT&T Mobility, LLC v. Concepcion* is unwarranted." *Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 645 (S.C. 2011) (emphasis added).

Second, Century BMW admitted in its briefing to the United State Supreme Court that the South Carolina Supreme Court's ruling means that Century BMW forfeited the ability to raise preemption. Defendant Century BMW's brief provides as follows:

> In its most recent order, the South Carolina Supreme Court determined that petitioner had forfeited that argument by failing to raise it earlier.

Petition for Writ of Certiorari. 13.

> The South Carolina Supreme Court's determination that petitioner had forfeited its preemption argument has no foundation in South Carolina law on the preservation arguments.

Petition for Writ of Certiorari. 14.

> [The forfeiture rule] is inequitable because it would deprive [Century BMW] of a "reasonable opportunity" to assert its federal rights.

Petition for Writ of Certiorari. 15.

Similarly, Century BMW's Reply Brief to the United States Supreme Court said:

> In the decision below, the South Carolina Supreme Court determined that petitioner had forfeited its contention that the Federal Arbitration Act (FAA) preempts a state-law rule invalidating a provision of an arbitration agreement precluding the availability of class arbitration

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Century BMW's Reply Brief to U.S Supreme Court. 1.

> [T]here is no valid justification for the South Carolina Supreme Court's subsequent forfeiture determination—a determination that unjustly deprived [Century BMW] of a "reasonable opportunity" to assert its federal rights.

Century BMW's Reply Brief to U.S. Supreme Court. 2.

Century BMW was correct; the South Carolina Supreme Court ruled that the Century BMW forfeited the ability to raise preemption, a position echoed by this Court.

INDISPENSABLE PARTY

Finally, I DENY Defendant's motion for judgment on the pleadings pursuant to Rules 12(b)(7) ("failure to join a party under Rule 19"), 12(c), and 12(h) SCRCP. Michael Watts is not an indispensable party because judgment rendered in Michael Watts's absence would not prejudice him, nor those who are already parties. Moreover, Mr. Watts executed an assignment of any rights he may have had in this action, to his daughter, Christine Watts, the named plaintiff. Therefore, he has no rights adverse to his daughter, nor will he be prejudiced by a ruling in this case. For the same reason, there is no risk of a subsequent

duplicative claim by Mr. Watts. Furthermore, this is not "the very rare" case where a person's absence warrants dismissal of the entire case *See* SCRCP 19(a) Note (Noting that "the number of cases in which there is truly an "indispensable party" in whose absence the court should not proceed are very rare.").

CONCLUSION

For the foregoing reasons, Defendant Century BMW's Motion for Judgment on the Pleadings for Failure to Join an Indispensable Party or, In the Alternative, to Compel Arbitration is DENIED.

IT IS SO ORDERED!

Barnberg, SC
Dec 31, 2012

The Honorable Doyet A. Early, III
Circuit Judge