STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND)	2020-CP-40-02790
)	
Crystal Morgan,)	
)	
Plaintiffs,)	**AMENDED ORDER**
vs.)	
)	
B & L Foreign Car LLC.)	
)	
)	
Defendant)	
)	

Presiding Judge:	The Honorable L. Casey Manning
Plaintiff's Attorney:	Pamela R. Mullis, Esquire
Defendant's Attorney:	J. Gregory Studemeyer, Esquire

The Court in addressing Defendant's Motion To Alter or Amend the Court's Order Signed September 25, 2020 regarding Plaintiff's Motion to Strike the Defendant's letter filed with the Court and Dismiss the same as an Answer, Plaintiff's Motion to Strike/ Dismiss the Arbitration Clause from the Contract and/ or Stay Arbitration and the Defendant's Motion to Set Aside the Entry of Default and permit the Defendant to file a late Answer. After reconsideration the Court Rules as follows:

Introduction

This matter arises from a contract between the parties on May 12, 2020, when the Plaintiff, purchased a vehicle from the Defendant LLC. The Plaintiff signed a sales contract purchasing a 2003 Honda vehicle with a standard adhesion contract that was drafted, by the Defendant, and included binding arbitration, which was not on the first page of the contract, underlined in all capital letters. There is no indication the contract is a transaction involving interstate commerce.

The Plaintiff filed a Summons and Complaint on June 16, 2020 for fraud, constructive fraud, and unfair trade practices in connection with this consumer purchase which was served on the

registered agent for the Defendant on June 22, 2020. The Defendant's manager filed a letter with the Court on July 10, 2020 dated June 29, 2020 that was not sent to Plaintiff or Plaintiff's counsel, asserting the Defendant LLC was entitled to arbitration pursuant to their sales contract. Thereafter, the Defendant's manager filed an Affidavit with the court reiterating he was a manager of the Defendant LLC and not a lawyer. The Defendant then retained Counsel and filed a motion to be permitted to file a late Answer.

Discussion

A. Unauthorized Practice of Law and the Defendant's Default.

The South Carolina Constitution provides this Court with the duty to regulate the practice of law in this state. *S.C. Const. art. V*, § 4; *see also S.C. Code Ann.* § 40-5-10 (2001). South Carolina, like other jurisdictions, limits the practice of law to licensed attorneys. *In re Lexington County Transfer Court,* 334 S.C. 47, 512 S.E.2d 791 (1999). "No person may practice or solicit the cause of another in a court of this State unless he has been admitted and sworn as an attorney." *S.C. Code Ann.* § 40-5-310 (2001). The generally understood definition of the practice of law embraces the preparation of pleadings, and other papers incident to actions and special proceedings, ... *Doe v. McMaster,* 355 S.C. 306, 585 S.E.2d 773 (2003); *State v. Despain*, 319 S.C. 317, 460 S.E.2d 576 (1995); *In re Duncan*, 83 S.C. 186, 65 S.E. 210 (1909). *Brown v. Coe*, 365 S.C. 137, 139-40, 616 S.E.2d 705, 706-07 (2005). A non-lawyer cannot represent a corporation in circuit or appellate courts. *Renaissance Enters., Inc. v. Summit Teleservices, Inc.*, 334 S.C. 649, 515 S.E.2d 257, (1999) See *S.C. Code Ann.* § 40-5-320. The Defendant's manager cannot file responsive pleading in the South Carolina court of common please as such response would properly be considered the unauthorized practice of law. Any such letter or response is stricken as improper.

The Defendant has filed a motion to set aside an Entry of Default, as the time to file an Answer has expired and the Defendant is now in Default. The Motion was made pursuant to Rule

55(c) and requires the Defendant make a showing merely of "good cause". The Defendant must provide an explanation to the Court for the default and give reasons why vacation of the default entry would serve the interests of justice. Once a party has put forth a satisfactory explanation for the default, the court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted. *Wham v. Shearson Lehman Bros., Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501-02 (Ct. App. 1989).

The Defendant filed an Affidavit of the Defendant's Manager in support of the Motion to set aside the Entry of Default, the Affidavit, covers the elements of the timing of the motion and states there is no prejudice to the Plaintiff, which is not true; as well as, concludes that the Defendant has a meritorious defense, but does not actually state what that defense actually may be. However, the Affidavit does not offer any reason for the failure to file an Answer within the time allotted, and offers no good cause as to why setting aside the entry of default would serve the interest of justice for failure to file a timely Answer within 30 days. The Defendant simply offered no reason for failing to retain counsel and file a timely answer. The Defendant has to meet a minimum burden to be relieved from an Entry of Default, however, the Defendant has offered no good cause. Therefore, the Motion to set aside the default and permit the Defendant to file an Answer is DENIED.

Furthermore, the Court will strike the letter from the record as the Defendant's manager is not a licensed attorney in South Carolina and is not permitted to file responsive pleadings on behalf of an LLC or practice law in a South Carolina Court.

B. Arbitration

The Defendant is attempting to assert an arbitration agreement pursuant to the Federal Arbitration Act. The FAA governs only if the arbitration provision is contained in "a contract

evidencing a transaction involving commerce." 9 U.S.C. § 2. In this case the Plaintiff is a citizen and resident of South Carolina and purchased a vehicle in South Carolina from a South Carolina LLC. The parties are both South Carolina residents, there is no interstate commerce involved in the contract between the parties and the sale of this vehicle in South Carolina. There is no evidence in the contract of any contracts with third parties in other states related to the performance of this contract, there is no equipment being used in the performance of this contract being shipped from out of state, and the contract does not contemplate any materials or supplies being transported across state lines. Where the contract does not have any nexus with interstate commerce, the Federal Arbitration Act does not apply. The contract and the arbitration clause is interpreted pursuant to South Carolina state law.

In the event the Defendant's arbitration agreement is not a clause but in fact a stand alone arbitration agreement, the arbitration agreement is unenforceable as a matter of law as the agreement lacks valuable consideration.

The Defendant claims the FAA applies merely because the matter involves the sale and financing of an automobile citing multiple cases involving national car dealerships with local franchise operations in South Carolina and contracts with financing that contemplate interstate commerce. That is clearly not the case here. The purchase of every car would clearly not come under the FAA, for instance the friendly purchase of a car between two neighbors in South Carolina, would not be interstate commerce. Here, the purchase of the vehicle was from a local LLC, within the state managed locally raises no evidence that the contract contemplated any interstate commerce The FAA would simply not apply to the purchase of this vehicle.

Arbitration is a matter of contract law and is available only when the parties involved contractually agreed to arbitrate. *Towles,* 338 S.C. at 37, 524 S.E.2d at 843-44. "Accordingly, a party may seek revocation of the contract under 'such grounds as exist at law or in equity,' including

fraud, duress, and unconscionability." *Simpson v. MSA of Myrtle Beach, Inc.,* 373 S.C. 14, 24, 644 S.E.2d 663, 668 (2007) (quoting S.C. Code Ann. § 15-48-10(a) (2005)). Arbitration will be denied if a court determines no agreement to arbitrate existed. *S.C. Code Ann. § 15-48-20(a) (2005).*

The arbitration provision is evaluated using general contract principles of state law, *Simpson*, 373 S.C. at 24, 644 S.E.2d at 668 (citing *Munoz v. Green Tree Fin. Corp.,* 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001)). In South Carolina we analyze contract provisions that are claimed as unconscionable with a **two-part test** - an absence of meaningful choice and oppressive, one-sided terms." *Simpson,* 373 S.C. at 25, 644 S.E.2d at 669 *Lucey v. Meyer,* 736 S.E.2d 274, 283-84 (S.C. Ct. App. 2012).

The first of the two prongs; absence of meaningful choice on the part of one party generally speaks to the fundamental fairness of the bargaining process in the contract at issue." *Id.* at 25, 644 S.E.2d at 669; *see Carlson v. General Motors Corp.,* 883 F.2d 287, 295-96 (4th Cir. 1989). "[U]nder general principles of state contract law, an adhesion contract is a standard form contract offered on a 'take-it-or-leave-it' basis with terms that are not negotiable." *Simpson*, 373 S.C. at 26-27, 644 S.E.2d at 669 (citing *Munoz v. Green Tree Fin. Corp.,* 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001)). The Defendant presented the Plaintiff with an adhesion sales contract which included such requirements as a choice of arbitrators out of Minnesota and New York. The Plaintiff lacked any meaningful choice regarding the terms of the contract and specifically the arbitration clause.

In the second prong of the Unconscionable test the Court must determine that by review of the terms of the contract that no fair and honest person would accept them. *Simpson*, 373 S.C. at 24-25, 644 S.E.2d at 668. The question the court must consider is if the terms of the agreement are oppressive and one-sided *Marzulli v. Tenet S.C., Inc.,* No. 2018-UP-132, 2018 S.C. App. Unpub. LEXIS 134, at 11 (Ct. App. Mar. 28, 2018). The Court finds the terms and the arbitration clause that requires the Plaintiff to waive a jury trial, discovery, any claims, past, present and future to be

terms that meet the second prong of the unconscionable test.

C. **State Law Applies**

Finally, since the contract would not be subject to state law regarding arbitration clauses the Court would consider the requirements of S.C. Code Ann. § 15-48-10.(a) which state:

> A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. *Notice that a contract is subject to arbitration pursuant to this chapter shall be typed in underlined capital letters, or rubber-stamped prominently, on the first page of the contract* and unless such notice is displayed thereon the contract shall not be subject to arbitration.

The Defendants claimed arbitration clause was not typed in capitol letter on the first page of the contract and underlined but was buried in the contract among pages and pages of documents that the Plaintiff signed and initialed. The arbitration clause was NOT conspicuous and not only violates South Carolina law requiring the arbitration clause to be conspicuous but was also unconscionable as a matter of law, as the arbitration clause provided the Plaintiff with no meaningful choice regarding arbitration, and the clause had oppressive one-sided terms.

IT IS HEREBY ORDERED for the foregoing reasons the Plaintiff's Motion to Strike the "letter" of the Defendant's Manager from the record is GRANTED, the Defendant's Motion to File a late answer is DENIED and the Defendant is in default.

The Plaintiff's Motion to Strike the Arbitration Clause from the Defendant's Contract is GRANTED.

AND IT IS SO ORDERED.

Columbia, South Carolina
November _____, 2020

L. Casey Manning
Presiding Judge, Fifth Judicial Circuit

Richland Common Pleas

Case Caption: Crystal Morgan vs B&L Foreign Car Llc

Case Number: 2020CP4002790

Type: Order/Other

So Ordered

s/L. Casey Manning, 2061