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Mar 22 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable J. Derham Cole, Circuit Court Judge

Case No. 2017-CP-42-2072
Appellate Case No. 2019-000344

Donald and Carlee Simmons ..... Respondents,

v.

Benson Hyundai, LLC ..... Appellant.

APPELLANT'S PETITION AND MEMORANDUM FOR REHEARING

TO THE HONORABLE COURT OF APPEALS OF SOUTH CAROLINA:

Benson Hyundai, LLC, by and through undersigned counsel, and under Rule 221 of the South Carolina Rules of Appellate Procedure, respectfully petitions this Court for a rehearing. This Court's opinion has the effect of finally deciding Benson's appeal. Petitioner respectfully shows the Court as follows:

I. INTRODUCTION

The undisputed facts show that the intent of the parties on two issues was absolutely clear: 1) the sale was contingent upon finance approval; and 2) any dispute would be settled by

arbitration.[1] The purchase of the car would not be binding if financing could not be approved. This was agreed to from the start; it is clearly reflected in the Retail Buyer's Order Worksheet (R. 72), the Retail Buyer's Order (R.126), the Special Delivery Agreement (R.75), and the Retail Installment Sales Contract (RISC) (R. 126). This is perfectly logical because the consideration for the purchase was contingent upon financing. Financing was not approved, so the Simmons were required to return the car.

Arbitration was freely chosen by the college professor and his wife, and the Arbitration Agreement (BAPP) was not contingent upon financing. It had its own consideration. This is why the Special Delivery Agreement was incorporated into the RISC but not the BAPP. To hold that the Special Delivery Agreement somehow makes the BAPP contingent upon financing was never the intent of the parties, and to rule in such a manner goes against their clear intent. Benson respectfully requests a rehearing.

II. THE COURT MISAPPREHENDED AND OVERLOOKED THE FOLLOWING POINTS:

A. The Decision Overlooks that the BAPP Must be Read to Give Meaning to all its Terms and to Give Effect to the Parties' Intent

The clear intent of the parties was that all obligations other than the agreement to arbitrate were contingent on approval of financing. "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009). The Special Delivery Agreement was incorporated only into the RISC. It is clear that without financing approval, there was no consideration for the purchase of the vehicle or any related products.

[1] "Where an agreement is clear and capable of legal interpretation, the court's only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it." *York v. Dodgeland of Columbia, Inc.*., 406 S.C. 67, 81, S.E.2d 139, 146 (Ct. App. 2013).

In contrast, the consideration for the BAPP was the agreement of the parties to forebear the right to a jury trial. The parties agreed disputes regarding financing were subject to the BAPP:

> Disputes subject to arbitration are any claim or dispute . . . which arise from or relate to Customer's credit application. . . or financing contract or any resulting transaction or relationship.

(R. 57). The clear intent of the parties in entering into the BAPP was that it would survive even if financing were not approved.

Courts are to assume that the parties intended that a binding contract be formed, and "[t]hus, any choice of alternative interpretations, with one interpretation saving the contract and the other voiding it, should be resolved in favor of the interpretation that saves the contract." *Stevens Aviation, Inc. v. Dyncorp Int'l LLC*, 407 S.C. 407, 756 S.E.2d 148, 153 (2014), quoting *Torncello v. United States*, 681 F.2d 756, 761 (Ct.Cl.1982). The Court should assume the parties intended to form a binding contract when they entered into the BAPP.

Contracts are to be read to give meaning to all terms and not in such a way as to render a clause superfluous. *Ryals v. ILA Local 1771*, 33 F.Supp.3d 634 (D. S.C. 2014); Restatement (Second) of Contracts § 203 (1981) ("[A]n interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect.") The Court's decision that the BAPP was not entered into absent financing approval would render the agreement to arbitrate disputes regarding Respondents' credit application or financing contract superfluous as denial of credit is a clearly covered dispute.

B. The Decision did not Address Contract Modification

The Special Delivery Agreement was incorporated into the RISC but not the stand-alone arbitration agreement (BAPP):

> The Special Delivery Agreement is Incorporated into the Retail Installment Sale Contract...

(R.75). The RISC expressly stated it could be modified in writing:

> **HOW THIS CONTRACT CAN BE CHANGED**. This contract contains the entire agreement between you and us relating to this contract. Any change to this contract must be in writing and we must sign it. No oral changes are binding. Buyer Signs s/*Carlee Robin Simmons* Co-Buyer Signs s/*Donald Lawrence Simmons.*
> (R. 128)

Both Respondents signed immediately under their agreement on how to change the RISC. They then signed the BAPP, modifying the RISC in writing, also signed by Benson (R. 57-58).

A written contract may be modified by a subsequent agreement of the parties, provided the subsequent agreement contains all the requisites of a valid contract. *U.S. Bank Trustee Nat'l Ass'n v. Bell*, 385 S.C. 364, 374, 684 S.E.2d 199, 204 (Ct. App. 2009); *Florence City-County Airport Com'n v. Air Terminal Parking Co.*, 283 S.C. 337, 322 S.E.2d 471 (Ct. App. 1984). The BAPP was signed by the Simmons after the RISC. (R. 181). Therefore, the parties specifically provided that any dispute would be resolved by arbitration: there was nothing remaining to be done with the BAPP. This modification does not create an inconsistency. See *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 84, 749 S.E.2d 139, 148 (Ct. App. 2013) (if a subsequently executed document signed by the Dealer effectuated a valid modification, no inconsistencies exist).

The parties indicated their intent in the RISC and BAPP that they were not to be construed together except to the extent that one modified the other. (R. 62, ¶24; R. 222).

Contract modification was not addressed by the Montana Supreme Court in *Thompson v. Lithia Chrysler Jeep Dodge of Great Falls, Inc.*, 185 P.3d 332, 340 (Mont. 2008). In *Thompson*, the plaintiffs signed a Retail Installment Sales Contract with an arbitration provision and a Vehicle Buyer's Order. There was no stand-alone Arbitration Agreement. Unlike this case, the Vehicle Buyers Order contained an arbitration clause and a "Notice to Purchaser" which stated:

> If this transaction is to be a retail installment sale, then this order is not a binding contract to the dealer and dealer shall not be obligated to sell until approval of the terms hereof is given by a bank or finance company willing to purchase a retail installment contract between the parties hereto based on such terms. If this approval is obtained, however, this order is a binding contract. If the purchaser is obtaining his own financing, this order is a binding contract as it is written. If a purchaser has received a copy of a retail installment contract as a part of this transaction, it shall not be binding to the dealer until accepted by the bank or finance company to which it will be assigned.

The Vehicle Buyer's Order also addressed arbitration, stating that "any controversy or claim arising out of or relating to this order, or breach thereof, shall be settled by arbitration . . ." Thus, obtaining satisfactory financing was a condition precedent to arbitration.

In the present case, the BAPP had no condition precedent of financing approval. Instead, it was a stand alone agreement that modified the RISC which incorporated the Special Delivery Agreement.

Brewer v. Stokes Kia, Isuzu, Subaru, Inc., 364 S.C. 444, 451, 613 S.E.2d 802, 806 (Ct. App. 2005) also does not address the issue of arbitration or contract modification. Like this case, the sale was contingent upon financing. However, no Arbitration Agreement was involved. Here, the college professor and his wife, in the end, modified the RISC and Special Delivery Agreement (openly and transparently) to resolve all disputes by arbitration.

C. Nothing Remained to be Done with the BAPP

The Special Delivery Agreement was incorporated into the RISC and had a provision that if the RISC was not assigned to a lender, then the Simmons would return the car. (R. 75). The Special Delivery Agreement had nothing to do with the BAPP, which only dealt with resolving disputes (R. 57). The BAPP made it clear that there was no condition precedent for it to be binding. Therefore, the Special Delivery Agreement, incorporated into the RISC, did not apply. Nothing in the BAPP refers to the Special Delivery Agreement nor the RISC. It is a standalone agreement in which the Simmons agreed in writing that if any dispute arose with respect to the purchase or financing of the car, they agreed to arbitrate. Therefore, as a matter of contract construction, the BAPP applied as there was no condition precedent relating to that contract. It was not contingent upon financing.

D. Grammatical Construction of the Special Delivery Does Not Require the Inclusion of the Arbitration Agreement

The Special Delivery Agreement stated Benson would attempt to assign the RISC on terms satisfactory to Benson, and "If the Seller is successful in so doing, the [RISC], (and all other documents executed by Buyer) shall be deemed delivered and fully binding." (R. 75). The grammatical structure of this sentence does not require the Court to conclude the BAPP was not formed by the parties.

The intent of the Special Delivery Agreement, as incorporated into the RISC, was that the purchase was not entered into unless financing was approved. This reflects the agreement of both parties that the purchase was to be financed. The BAPP, in contrast, did not have as its essence an agreement that the transaction was to be financed. In fact, all agreed it would apply to disputes "which arise out of ... customer's ... financing contract ..." (R. 57). Therefore, it was

an agreement regarding the forum for resolving disputes between the parties, including disputes relative to the RISC and Special Delivery Agreement.

The Supreme Court of Vermont has noted that a parenthetical word or phrase is supplementary to the language it follows and is optional for the reader. *Towslee v. Callanan*, 190 Vt. 622, 55 A.3d 240, 2011 VT 106 (Vt. 2011), citing The Oxford Companion to the English Language 750 (1st ed.1992). The Texas Court of Appeals similarly noted that a parenthesis is an "interruption" of a sentence. *Rowan Cos. v. Wilmington Trust*, 305 SW 3d 698 (Tex. App. 2010) citing R.W. Burchfield, The New Fowler's Modern English Usage, 571 (rev. 3d ed., Oxford Univ. Press 2000) ("It is important to bear in mind that a parenthesis may or may not have a grammatical relation to the sentence in which it is inserted."). The parenthetical in the Special Delivery Agreement should not, therefore, be read as including the BAPP.

Because there is a question as to the Parties' intent regarding the BAPP, arbitration should be compelled. "Motions to compel arbitration should not be denied unless the arbitration clause is not susceptible of any interpretation that would cover the asserted dispute." *Towles v. United HealthCare Corp.*, 338 S.C. 29, 41-42, 524 S.E.2d 839, 846 (Ct. App. 1999).

E. The Decision Overlooks the Fact that Arbitration Survives Termination of a Contract

The duty to arbitrate under an arbitration clause in a contract survives termination of the contract. *Jackson Mills, Inc. v. BT Capital Corp.*, 312 S.C. 400, 440 S.E.2d 877 (1994). This reflects the clear intent of the parties in entering into an arbitration agreement. Otherwise, a party could avoid arbitration by simply terminating the agreement, or in this case, causing a condition precedent to the purchase of the vehicle not to occur. The BAPP covers disputes regarding the denial of a financing contract and, therefore, must survive the denial.

F. The Decision Overlooks the Fact that Whether a Condition Precedent has been met is an Issue for the Arbitrator

It is presumed that the parties intend arbitrators, not courts, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration. *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 86 (2002). This includes the satisfaction of "prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate." *Id.* at 85 (quoting the Revised Uniform Arbitration Act of 2000 § 6, Comment 2, 7 U.L.A. 13 (Supp.2002). See also 9 U.S.C. § 6(c) ("An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled"). The question of whether financing approval is a condition precedent to the BAPP is for the arbitrator.

G. The BAPP Remains the Full Agreement of the Parties

Both Carlee and Donald Simmons signed the BAPP under the following capitalized words:

> I AGREE TO ARBITRATE ANY DISPUTES . . .
>
> | | |
> |---|---|
> | 7/26/16 | s/Carlee Robin Simmons |
> | Date | Buyer |
> | 7/26/16 | s/Donald Lawrence Simmons |
> | Date | Co-Buyer |
> | 7/26/16 | s/Brian Perry |
> | Date | Dealer Benson |

If, and only if, a document attempting to change this contract was signed (in writing) by all would it apply. Paragraph 24 provides:

> The parties' Agreement and these Rules constitute the full agreement of the parties and can be changed only in writing signed by the individual and an executive officer of Benson.

Neither the Special Delivery Agreement nor the RISC into which it was incorporated were signed by an executive officer of Benson, and therefore, they cannot modify the BAPP. Mr. Simmons was a college professor, and no evidence was presented that he was incapable of reading and understanding the English language. Thus, the BAPP represents the full agreement of the parties.

CONCLUSION

Therefore, this Court should grant Benson's Petition for Rehearing, reverse the decision of the lower court, enforce the BAPP, and refer this case to arbitration.

Respectfully submitted,

March 22, 2022

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Benson Hyundai, LLC ..... Appellant,

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PROOF OF SERVICE

I certify that I have served Appellant's Petition and Memorandum for Rehearing by depositing a copy in the U.S. Mail, postage prepaid, on March 22, 2022, addressed to attorney of record, Warren Moise, Esq., Grimball and Cabaniss, LLC, 1180 Sam Rittenberg Boulevard, Suite 120, Charleston, SC 29417.

March 22, 2022

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March 22, 2022

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: *Donald and Carlee Simmons v. Benson Hyundai, LLC*
Appellate Case No. 2019-000344

Dear Ms. Kitchings:

Enclosed for filing please find the original and six copies of Appellant's Petition and Memorandum for Rehearing in the above matter along with our firm's check in the amount of $50.00 for the filing fee, and a Proof of Service.

Thank you for your attention to this matter. Should you have any questions, please do not hesitate to contact me.

Sincerely,

Bradford N. Martin

/pm
Enclosures

cc: Warren Moise, Esq.