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NOVEMBER 19, 2008
(FILE NO. 2008-SC-0362-D)**

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000293-MR

PAUL MILLER FORD, INC.

APPELLANT

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
ACTION NO. 06-CI-01412

BRIDGETTE RUTHERFORD

APPELLEE

OPINION AFFIRMING

** ** * ** * ** *

BEFORE: COMBS, CHIEF JUDGE; HOWARD,¹ JUDGE; GUIDUGLI,² SENIOR
JUDGE.

¹ Judge James I Howard concurred in this opinion prior to the expiration of his appointed term of office on December 6, 2007. Release of the opinion was delayed by administrative handling.

² Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

COMBS, CHIEF JUDGE: Paul Miller Ford, Inc., appeals from an interlocutory order of the Pike Circuit Court denying its motion to compel arbitration. The trial court based its decision on a provision in a questionnaire that was filled out by the appellee, Bridget Rutherford. The court determined that the arbitration provision that Paul Miller Ford sought to compel was not enforceable. We affirm.

On August 16, 2006, Bridget Rutherford responded to a newspaper advertisement offering to sell a 2004 Chevrolet Cavalier automobile. The advertisement had been posted by Paul Miller Ford dealership in Lexington, Kentucky. Rutherford traveled from her home in Pike County to inspect the car in Lexington. She liked the car, and the parties eventually negotiated a value for her automobile to be taken in trade and the purchase price of the Cavalier that she had selected. After the terms of the trade-in and purchase were established, Rutherford signed numerous documents: an agreement to purchase, a contract of sale, an insurance verification form, an application for credit, a title lien statement, an application for certificate of title, two odometer disclosure statements, a warranty statement, a vehicle verification certificate, a dealer warranty disclaimer, a privacy notice, a retail installment contract and security agreement, an addendum to the sales contract, and a limited power-of-attorney instrument. She was asked to review a variety of other documents that were not to be signed. Finally, in winding up, Rutherford was asked to complete what appeared to be a questionnaire regarding the transaction.

After she completed the paperwork and confirmed that the Cavalier was insured, Rutherford drove it from the dealership. According to Rutherford, representatives of Paul Miller Ford had advised her that the application for financing had

been approved and that the transaction was now complete. Later, Rutherford received correspondence from Paul Miller Ford expressing the dealership's appreciation for her business. She next received her registration and license for the vehicle through the mail; finally, she received the certificate of title for the Cavalier.

Subsequently, however, a Paul Miller Ford representative contacted Rutherford to report that her application for financing had been rejected. The financial services company to which the installment contract and security agreement had been assigned was unable to confirm her income. According to Rutherford in order to seal the deal, Paul Miller Ford representatives then forwarded to her fraudulent federal tax forms that grossly inflated her income. Rutherford steadfastly refused to execute the tendered tax returns, and Paul Miller Ford re-possessed the Cavalier from her workplace on September 22, 2006.

On October 31, 2006, Rutherford filed a complaint against Paul Miller Ford in Pike Circuit Court. She alleged that Paul Miller Ford's actions had caused her to suffer extreme embarrassment, humiliation, and inconvenience. She charged that the dealership's conduct had been willful, outrageous, fraudulent, and malicious. She sought to recover for the loss of the Cavalier and its contents. She also sought to recover damages for her emotional distress and for the inconvenience that she claimed she suffered as a direct result of Paul Miller Ford's actions.

Before it answered her complaint, Paul Miller Ford filed a motion to dismiss the action and to compel arbitration. After a hearing, the trial court denied the motion. This appeal followed.

Rutherford admits that she signed a document referring to arbitration.

However, she contends that the document was designed to mislead customers by appearing to be a customer survey. Moreover, and consistent with what she regards as a deceitful ploy, Rutherford contends that a representative of Paul Miller Ford signed the document purportedly as a mere “witness” -- but not in a capacity that indicated that he was a party to the contract or that the parties shared any mutuality of obligation with respect to the document. Rutherford argues that the claims included in her complaint fall outside the scope of the arbitration clause and are not subject to any alternative dispute resolution process. She believes that the arbitration provision is not binding or enforceable against her and that the trial court did not err by denying Paul Miller Ford's motion to compel arbitration.

The clause at issue in this appeal was not included on the parties' sales contract or its addendum. Instead, the provision appears at the foot of a one-page, untitled document featuring the Paul Miller Ford logo. The document is a pre-printed, fill-in-the-blank form. The specific information relevant to the transaction with Rutherford, including the date, were typed into the form's blanks. At the top of the page, immediately below the logo and date, the document provides as follows:

IT IS OUR SINCERE DESIRE TO GIVE OUR
CUSTOMERS THE FINEST POSSIBLE SERVICE. IT IS
ALSO OUR DESIRE TO HAVE NO
MISUNDERSTANDING REGARDING ANY PART OF
THIS TRANSACTION. . .WE THEREFORE REQUEST
THAT YOU, THE CUSTOMER, FILL OUT THE
FOLLOWING QUESTIONS BEFORE TAKING
DELIVERY OF THIS AUTOMOBILE.

Twelve enumerated statements -- printed in substantially smaller type -- follow this introduction. A short, single line designated for the purchaser's initials appears alongside each statement. Each statement references a specific portion of the transaction. Rutherford initialed each of these statements.

Near the bottom of the page, a short paragraph, number thirteen, provides as follows:

ARBITRATION: Any claim or dispute arising out of or in any way relating to this contract, the negotiations, financing, sale or lease of the vehicle which is the subject of this contract, including any claim involving fraud or misrepresentation, must be resolved by binding arbitration administered by the Better Business Bureau of Central and Eastern Kentucky, Inc. in accordance with its rules. All arbitration proceedings shall be held in Lexington, Kentucky. The decision of the arbitrator(s) will be final, conclusive and binding on the parties to the arbitration and no party shall institute any suit with regard to the claim or dispute except to enforce the arbitration decision. Venue for any action to enforce this arbitration agreement, or an arbitration decision shall be in Fayette County, Lexington, Kentucky.

Unlike the other enumerated provisions, **no space was provided for Rutherford's initials** following the pre-printed text. Rutherford signed the document at a designated spot at the bottom of the page, and a Paul Miller Ford representative signed as a “witness.”

Paul Miller Ford contends that the arbitration clause included in the contract documents is binding and enforceable in this action and that the trial court erred by denying its motion to dismiss the action and to compel arbitration.

Kentucky's arbitration statute expresses a policy aimed to favor and to encourage arbitration. *Fayette County Farm Bureau v. Martin*, 758 S.W.2d 713 (Ky.App. 1988). Kentucky Revised Statutes (KRS) 417.050 provides in pertinent part as follows:

A written agreement to submit any existing controversy to arbitration or a provision in 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 for the revocation of any contract.** (Emphasis added).

KRS 417.060(1) provides:

On application of a party showing an agreement described in KRS 417.050, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration. If the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised. The court shall order arbitration if found for the moving party; otherwise, the application shall be denied.

These statutes provide that a trial court shall adjudicate any disputes concerning the existence or validity of an agreement of the parties to submit to alternative dispute resolution. *Louisville Peterbilt, Inc. v. Cox*, 132 S.W.3d 850 (Ky. 2004).

While “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration,” *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983), the existence of a valid arbitration agreement as a threshold matter must first be resolved by the court. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995). The court – not an arbitrator – must decide whether the parties have agreed to arbitrate based on fundamental principles governing contract law.

As already set forth, the arbitration provision at issue here applies to “any claim or dispute arising out of or in any way relating to this contract. . . .” Rutherford's claims against Paul Miller Ford are all based on Paul Miller Ford's alleged bad acts within the context of the parties' mutual contract rights. As a result, Rutherford's claims “arise out of” or “relate to” the contract and are proper subject matter coming within the scope of the arbitration provision.

Under the provisions of KRS 417.050, an arbitrable dispute is subject to the compulsory arbitration provision **except** where the agreement may be avoided “upon such grounds as exist at law or in equity for the revocation of any contract.” One of the equitable grounds upon which an arbitration clause may be deemed unenforceable is unconscionability. *Conseco Finance Servicing Corp. v. Wilder*, 47 S.W.3d 335 (Ky.App. 2001). The determination whether an arbitration clause is unconscionable is a question of law subject to our *de novo* review. *Id.* at 341.

Generally, a written agreement duly executed by the party to be held will be enforced according to its literal terms. *Cline v. Allis-Chambers Corp.*, 690 S.W.2d 764 (Ky.App. 1985). However, where there is a question whether a contract provision such as an arbitration clause is unconscionable or whether it exists at all as a meeting of the minds, courts must examine the facts and circumstances surrounding the creation of the agreement. *Conseco Finance Servicing Corp. v. Wilder*, 47 S.W.3d 335 citing *Forsythe v. BancBoston Mortgage Corp.*, 135 F.3d 1069 (6th Cir. 1997). Courts must assess such claims on a case-by-case basis to determine if inclusion of the arbitration clause in the parties' agreement was abusive, unfair, or perhaps even involuntary and unknowing. *Conseco, supra*.

Under the facts and circumstances of this case, we agree with the trial court that the inclusion of the arbitration clause in the parties' contract for purchase of the automobile violated principles of equity. The parties' initial negotiations for the purchase of the Cavalier did not include a briefing on the nature of arbitration or any discussion concerning the potential advantages and disadvantages of alternative dispute resolution. Moreover, the arbitration provision was not set out in the agreement to purchase, in the sales contract, or in its addendum. Instead, the provision was tucked into an untitled document that for all intents and purposes appeared to be a simple questionnaire aimed at assessing the satisfaction of the dealership's customer following completion of the transaction. In fact, it was an arbitration clause masquerading as the kind of performance evaluation that might be passed out in a restaurant or a hotel.

The nature of the document was further obscured by the arrangement and content of the first twelve statements appearing in the form. These statements merely recapitulated and summarized the terms of the purchase agreement. The arbitration clause, paragraph number thirteen, however, did not review or confirm any part of the parties' agreement. Instead, it injected a wholly new and important term into the bargain. Although the clause significantly altered the parties' agreement, its appearance and placement within the document gave no meaningful notice of its true importance so as to create a meeting of the minds.

The arbitration clause failed to put Rutherford on notice that she was waiving her constitutional right to trial by jury and an appeal to the courts as of right. We note that Paul Miller Ford was represented by a "witness" as distinguished from an agent

having authority to bind its principal. The arbitration provision was so misleading as to amount to a deliberate deception precluding any mutuality of intent or understanding.

We hold that the trial court did not err by concluding that the parties did not enter into a valid agreement to arbitrate. Accordingly, it correctly refused to order arbitration in this matter. We affirm the January 10, 2007, order of the Pike Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Carroll M. Redford, III
Susan Y.W. Chun
Lexington, Kentucky

BRIEF FOR APPELLEE:

Christian R. Harris
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