

STATE OF MISSOURI)
) SS
CITY OF ST. LOUIS)

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(City of St. Louis)

FILED
OCT 10 2014

22ND JUDICIAL CIRCUIT
CIRCUIT CLERK'S OFFICE
BY _____ DEPUTY

MOTORMAX FINANCIAL SERVICES)
CORPORATION,)
) No. 1322-AC12550-01
Plaintiff/)
Counterclaim Defendant,)
) Division No. 29
vs.)
)
ARNOLD RAYMOND KNIGHT,)
)
Defendant/)
Counterclaim Plaintiff.)
)

ORDER and JUDGMENT

The Court has before it Plaintiff/Counterclaim Defendant Motormax Financial Services' Motion to Compel Arbitration. The Court now rules as follows.

On or about September 16, 2013, Plaintiff/Counterclaim Defendant Motormax brought this action against Defendant Arnold Knight, alleging that Mr. Knight failed to pay as agreed on a written contract the sum of \$3,635.28 plus interest at a rate of 93.50% per annum. Motormax alleged that it had previously repossessed and sold the applicable collateral to the loan, Mr. Knight's 1999 Ford F150, leaving a balance allegedly due and owing of \$1,820.85 plus interest and attorney's fees and costs.

On February 26, 2014, Mr. Knight filed a "Class Action Counterclaim for Violation of Uniform Commercial Code Notice of Sale Requirements." Mr. Knight alleges that Motormax's repossession of the 1999 Ford F150 failed to meet the notice requirements of §§400.9-611 to 400.9-614 RSMo, and also violated the Missouri Merchandising Practices Act.

On or about April 4, 2014, Motormax filed a Motion to Compel Arbitration of Defendant's Counterclaim. When considering whether a party is compelled to arbitrate, we first must determine if a valid arbitration agreement exists. M & I Marshall & Ilsley Bank v. Sader & Garvin, L.L. C., 318 S.W.3d 772, 776 (Mo.App. W.D. 2010). It is a firmly established principle that parties can be compelled to arbitrate against their will only pursuant to an agreement whereby they have agreed to arbitrate claims. Greene v. Alliance Auto., Inc., 435 S.W.3d 646, 650 (Mo.App. W.D. 2014). The elements required to form a valid agreement to arbitrate in Missouri are offer, acceptance, and bargained for consideration. Id.

There is no dispute as to the first element. Plaintiff cites the "Motormax Financial Services Corp. Arbitration Agreement," which states in pertinent part as follows:

1. Consumer and Lender agree that all claims, demands, disputes, or controversies of every kind or nature that may arise between them concerning any of the negotiations

leading to the sale or financing of the Vehicle, representation made during or prior to any such transaction, terms and provisions of the sale, lease or financing agreements, arrangements for financing, disclosures, purchase of insurance, purchase of service contracts, the performance or condition of the Vehicle, credit inquiries or disclosure, trade-in, payoff of existing debt on trade-in, pre-closing delivery, or any other aspect of the Vehicle and its sale or financing shall be settled by binding arbitration conducted pursuant to the provision of 9 U.S.C. Section 1, et seq., according to the Commercial Rules of the American Arbitration Association. Without limiting the generality of the foregoing, it is the intention of the Consumer and Lender to resolve between them by binding arbitration all disputes of every kind and nature made pursuant to state, federal or local law concerning the Vehicle, its sale or financing of the Vehicle, any damage to the Vehicle, the terms, meaning and enforceability of any of the documents signed or given in connection with the sale, lease, or financing of the Vehicle, or any terms, conditions, or representations made in connection with the financing, credit life insurance, disability insurance, credit inquiries, disclosures, and vehicle extended warranty or service contract purchased or obtained in connection with the Vehicle. Consumer hereby waives their right to participate as a representative, claimant or member of any class action pertaining to any claim that is subject to arbitration, as any claim which could be asserted in a class-action proceeding shall be arbitrated.

2. Notwithstanding the foregoing, excepted from the Agreement are actions at law or in equity by Lender, Lender [sic] its assignees to collect any debt owed by the Consumer, to enforce the provisions of any security agreement securing such debt, or to exercise any right, including repossession, that may arise as a result of the failure of Consumer to comply with the provisions of any agreement evidencing such debt or any security agreement securing same or to recover possession of the vehicle if delivered to Consumer prior to consummation of the sale of same. If any action is brought by Lender or its assignees that is excepted from arbitration pursuant to

this paragraph, any counterclaim or offset claim that is asserted by the Consumer must nonetheless be arbitrated.

3. Either party may require arbitration by making an arbitration demand as required by applicable Commercial Rules of the American Arbitration Association. The Consumer and Lender agree that any arbitration proceedings held pursuant to this Agreement shall be conducted in the city where Lender's facility is located. The undersigned Lender agrees that, upon a finding of financial hardship of the Consumer by the American Arbitration Association, in accordance with its Commercial Rules, Lender will pay the filing fees and costs of the arbitration process for the Consumer if directed by the American Arbitration Association.

4. The Consumer agrees that this transaction shall be Arbitrated individually and shall not be included in any form of Class Action Claims.

The Arbitration Agreement is properly categorized as a "broad" arbitration clause since it covers "all claims, demands, disputes, or controversies of every kind or nature." See McCarney v. Nearing, Staats, Prelogar & Jones, 866 S.W.2d 881, 889 (Mo.App. W.D. 1993). The Arbitration Agreement was signed June 28, 2012 by Mr. Knight. Generally, parties are bound by the contracts they sign and courts will enforce those contracts unless they were induced by fraud, duress, or undue influence. Greene, 435 S.W.3d at 652.

With regard to consideration, "if a contract contains mutual promises, such that a legal duty or liability is imposed on each party as a promisor to the other party as a promisee, the contract is a bilateral contract supported by sufficient consideration." Id.

If, on the other hand, the terms of the agreement are extremely one-sided, the arbitration clause is unconscionable and unenforceable. Brewer v. Missouri Title Loans, 364 S.W.3d 486, 493 (Mo. banc 2012).

Here, the fact that self-help repossession and debt collection lawsuits are available for the Lender, while the Consumer must arbitrate any and all claims proves that the arbitration agreement lacks mutuality. See, Brewer, 364 S.W.3d at 495; Greene, 435 S.W.3d at 653. The Court finds that the Arbitration Agreement therefore fails for lack of consideration and cannot be enforced.

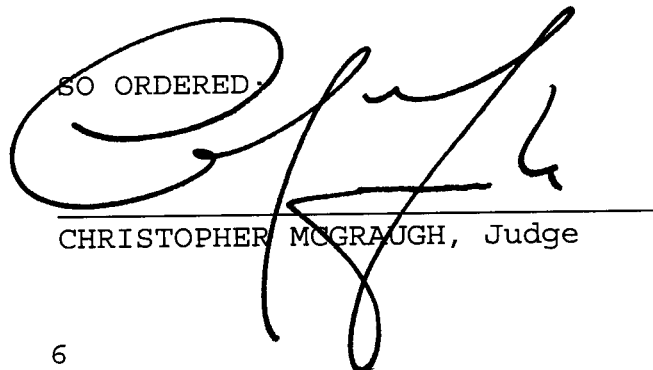
Additionally, even if the Arbitration Agreement were valid and enforceable, the Court finds that Plaintiff/Counterclaim Defendant Motormax has waived its right to arbitration by initiating the lawsuit in this matter. The right to arbitrate can be waived where the alleged waiving party: "(1) had knowledge of the existing right to arbitrate; (2) acted inconsistently with that existing right; and (3) prejudiced the party opposing arbitration by such inconsistent acts." Major Cadillac, Inc. v. Gen. Motors Corp., 280 S.W.3d 717, 722 (Mo.App. W.D. 2009). Regarding the first element, it is clear that Motormax knew that the arbitration clause existed because it drafted the contract. Id. Secondly, even though collection suits are a permissible alternative under the Agreement,

and the Agreement specifically provides that any counterclaim or offset claim asserted by the Consumer must nonetheless be arbitrated, the Court believes that Motormax acted inconsistently with its right to arbitrate by initiating litigation. See McCarney v. Nearing, Staats, Prelogar & Jones, 866 S.W.2d 881, 891 (Mo.App. W.D. 1993).

The prejudice requirement for finding a waiver is met "when the party seeking arbitration substantially invokes the judicial process to the detriment or prejudice of the other party." Major Cadillac, 280 S.W.3d at 722. Here, Motormax affirmatively haled Mr. Knight into court with this lawsuit, but then attempted to prevent Mr. Knight's counterclaim, which may be compulsory under Rule 55.32(a), by invoking the Arbitration Provision. It is clear that the potential prejudice to Mr. Knight makes the finding of a waiver appropriate.

THEREFORE, it is Ordered and Decreed that Plaintiff/Counterclaim Defendant Motormax Financial Services' Motion to Compel Arbitration is DENIED.

Dated: 10.10.14

SO ORDERED.

CHRISTOPHER MCGRAUGH, Judge